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Summaries of  
Decisions  
(Volume 20  
1990)

# Commercial Registration Appeal Tribunal



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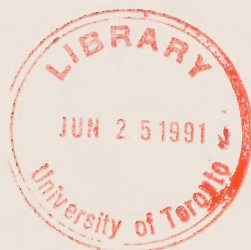
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Summaries of Decisions

Volume 20 (1990)



Ontario



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS\* - VOLUME 20

CITED 1990 20 C.R.A.T.

- \* This volume contains in some instances full decisions and reasons given, and in others, summaries only of Tribunal decisions and Supreme Court of Ontario decisions. If reference to the exact decision is desired, application should be made to the Registrar.

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Pyl-Chem Hotel Limited	20 C.R.A.T.	580
Scott, James		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75
Sharpe, Charles M.		
(Frank's Restaurant)	6 L.L.A.T.	29
Silver, Morris and Edith		
(Centennial College of Applied		
Arts and Technology)	5 L.L.A.T.	5
(Chick 'n' Deli Restaurant)	5 L.L.A.T.	14
(Restaurant L'Eventail)	5 L.L.A.T.	65
612471 Ontario Limited		
(Firenze Ristorante Italiano)	15 C.R.A.T.	255
Smart, John	20 C.R.A.T.	589
373857 Ontario Limited		
(Bobby Jo's Restaurant)	7 L.L.A.T.	40
Wahnekewening Beach Cottage Owners Association		
(Piccolo Castello Trattoria Restaurant)	13 C.R.A.T.	75

### Mortgage Brokers Act

Haron Investments Inc. (Nicolas Nicolaides) (Canadian Financial Services)	Admissibility notice of further particulars	12 C.R.A.T.	37
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Amato, Pietro (Pete's Auto Repairs)	Adjournment	11 C.R.A.T.	33
Ayton, Michael Valentine	Extension of time	10 C.R.A.T.	14
Baldassarre, Antonio	Application for an Order granting a Stay of CRAT Decision pending the dis- position of the Appeal to the Supreme Court	10 C.R.A.T.	20
Baldassarre, Antonio	Objection to composition of Tribunal	10 C.R.A.T.	23
Barrette, Cyril Centennial Plymouth Chrysler (1973) Ltd. (D. Brown Motors (Barrie) Ltd.) (Gordon D. Coates)	No jurisdiction	12 C.R.A.T.	50
Coward, John D. and John D. Coward Enterprises Limited (John D. Coward Automotive Retailers)	Granting Stay of CRAT Order	15 C.R.A.T.	253
Dueck, Norbert H.	Adjournment denied	18 C.R.A.T.	418
Dueck, Norbert H.	Stay granted awaiting SCO action with terms and conditions	18 C.R.A.T.	426
Dueck, Norbert H.	Order varied	18 C.R.A.T.	429
Dueck, Norbert H.	Reasons for Stay (to vary a previous Order)	20 C.R.A.T.	550
Dueck, Norbert H.	Extension of time	20 C.R.A.T.	554

### Motor Vehicle Dealers Act (continued)

H & J Auto Centre Limited (Howard Dillon) (Town and Country Auto Centre)	Stay denied awaiting SCO action	13 C.R.A.T.	143
MacMillan, Donald Neil	Admissibility of information	11 C.R.A.T.	63
McClocklin, Richard Gary (operating as "R - cars")	Granting Stay	12 C.R.A.T.	69
Stephenson, James	Stay denied	11 C.R.A.T.	76

### Ontario New Home Warranties Plan Act

Abcon Limited	No jurisdiction	13 C.R.A.T.	160
Ahmed, Mr. and Mrs.	Granting adjournment	17 C.R.A.T.	271
Ahmed, Mr. and Mrs.	Re: costs	18 C.R.A.T.	413
Ashley Oaks Homes Inc.	Order	20 C.R.A.T.	546
Beacom, Bruce	Granting adjournment	12 C.R.A.T.	99
Bertrand, Brent	Granting adjournment	12 C.R.A.T.	102
Bobby Rubino of Canada Limited	Document examination	12 C.R.A.T.	106
Boucher, Bernard and Mary	Granting application to inspect and examine premises	12 C.R.A.T.	113
Brenzel, S. J.	Extension of time	11 C.R.A.T.	81
Bradbury, Construction Limited	Consent Order	13 C.R.A.T.	193
Carleton Condominium Corporation No. 111	Granting adjournment	13 C.R.A.T.	201
Ciulla, Salvatore	Adjournment and Order	20 C.R.A.T.	547
Coventry-Graystone Properties Limited	Extension of time	11 C.R.A.T.	85

# Ontario New Home Warranties Plan Act (continued)

Credit Valley Contracting Corp.	NHWP Registrar not allowed to w/d Proposal but req. for postponement granted with terms and conditions	18 C.R.A.T.	423
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Germeney, B. S.	Granting adjournment	12 C.R.A.T.	131
Greely Custom Homes Ltd	Granting Stay of CRAT Order-with condition	17 C.R.A.T.	275
Hale, Robert	Adjourned pending decision in Supreme Court	20 C.R.A.T.	564
Halton Condominium Corporation	No entitlement to hearing	11 C.R.A.T.	104
No. 41	Undertaking	13 C.R.A.T.	208
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Heasman, Reginald	Granting adjournment	12 C.R.A.T.	136
Heath, Patricia	Adjournment	20 C.R.A.T.	570
Hussain, Hannif	Conciliation	11 C.R.A.T.	108
Jaye, Norman	Adjourned	20 C.R.A.T.	571
Kozierok, Leon	pending decision in Supreme Court		
Lacika, Mr. and Mrs. E.	Adjournment (objection to panel member)	20 C.R.A.T.	578
Lall, U.	Authority for Agent to act	12 C.R.A.T.	140
Lockwood, Bernard Bruce	Granting adjournment	12 C.R.A.T.	153
McEachern, Walter H. and	Direction	13 C.R.A.T.	219
Elizabeth K.	Granting adjournment	18 C.R.A.T.	445
Moir, James and Pamela			

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Rayner, Barry	Granting adjournment	12 C.R.A.T. 193
Reliable Construction (see 584745 Ontario Limited) Robitaille, J.	Written notice of claim	12 C.R.A.T. 201
Sapiano, Joseph F.	No jurisdiction	20 C.R.A.T. 583
Scott, Vicki Lynn	Extension of time	10 C.R.A.T. 107
Shah, Ismat	Adjournment (terms and conditions)	20 C.R.A.T. 588
Wentworth Condominium Corporation No. 45	Claim after expiry date	14 C.R.A.T. 204
Wiley, Mr. and Mrs. G.	Order - hearing adj. sine die pending decisions in SCO actions	18 C.R.A.T. 454
York Condominium Corporation No. 297	Not covered by warranty	14 C.R.A.T. 216
York Condominium Corporation No. 461	Adjournment denied	16 C.R.A.T. 293

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Castle Keep Real Estate Limited - Robinson et al	Clarification	11 C.R.A.T. 146
Cohen, Maurice L.	No jurisdiction	16 C.R.A.T. 288
Dani, Quemal Cam	Compliance with agreement	12 C.R.A.T. 240
Dani Realty Corporation Limited	Order of compliance	12 C.R.A.T. 240
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Leung, Frank	Separate hearings	11 C.R.A.T.	193
Monteith, Newton G.	witness	15 C.R.A.T.	273
Morrissey, Joseph A.	Consent Order	13 C.R.A.T.	291
Nimmo, Robert Bruce	Appl'cn. by Applicant for lifting of stay denied	18 C.R.A.T.	448
O'Brien, Gregory J.	Consent Order	13 C.R.A.T.	294
Rana, Sudershan and Shipra	Adjournment and Order	20 C.R.A.T.	581

### Travel Industry Act

Adventure Tours	Point of Law	11 C.R.A.T.	197
AGS International Travel & Services	Registrar's Order	15 C.R.A.T.	251
(Angela Stippinger)	extended	13 C.R.A.T.	302
Alitours Inc.	No entitlement	18 C.R.A.T.	416
Appleby Travel Service	Suspension lifted	10 C.R.A.T.	143
Ashok Travel Limited	Request for adjournment	16 C.R.A.T.	286
Aslanidis, Steve (See Thessaloniki)	Adjournment and Order	12 C.R.A.T.	246
Bolos Travel Service	Adjournment and Order	12 C.R.A.T.	247
(Andy Hadjiyannakis)	Consent Order		
Concorde Travel Agency			
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Douglas Travel (See Starburst Holidays)			



Travel Industry Act (continued)

889362 Ontario Ltd. (Sun Holidays)	Extension of expiration of Order	20 C.R.A.T. 556
Hadjiyannakis, Andy (See Bolos Travel)		
Koehler, Susan (See Lifestyle Travel)		
Lawson McKay Tours	Refusal of affidavit evidence	11 C.R.A.T. 206
- Clark et al	No jurisdiction	11 C.R.A.T. 209
- Lowes, Florence	No jurisdiction	11 C.R.A.T. 210
Lifestyle Travel (Susan Koehler)	Adjournment and Order	12 C.R.A.T. 252
Lowes, Florence	Entitlement to hearing	15 C.R.A.T. 267
Manila International Travel Agency Ltd	Suspension	13 C.R.A.T. 303
Manitoba Travel Association - Byron's et al	Procedure	11 C.R.A.T. 232
Merivale Travel Agency Limited	Adjournment and Order	20 C.R.A.T. 579
141603 Canada Limited	Order as per settlement	18 C.R.A.T. 453
Penhale Travel Agency	No entitlement	17 C.R.A.T. 281
Professional Seminar Consultants - Associated Building Industry of Northern California - Brown et al		11 C.R.A.T. 237
- Medical Society of Santa Barbara County - Almklov et al		11 C.R.A.T. 240
- Alameda County Dental Society Crutcher et al		11 C.R.A.T. 243
- Golden Gate Nurses Association Inc. - Chappel et al	Multiple claims - Adjournment	11 C.R.A.T. 246

Travel Industry Act (continued)

Professional Seminar Consultants		
- Associated Building Industry of Northern California	Affidavit evidence	14 C.R.A.T. 199
- Brown et al		
- Medical Society of Santa Barbara County	Affidavit evidence	14 C.R.A.T. 199
- Almklov et al		
- Alameda County Dental Society		14 C.R.A.T. 199
- Crutcher et al		
795159 Ontario Inc.	Extension of expiration of Order	20 C.R.A.T. 585
(Concorde Travel Agency)		
Starburst Holidays Inc.		
(Douglas Travel)		
(Traveler's Tree)	Consent Order	13 C.R.A.T. 361
Stippinger, Angela		
(see AGS International Travel)		
Sun Holidays		
(see 889362 Ontario Ltd.)		
Thessaloniki-SKG Travel Service	Adjournment and Order	16 C.R.A.T. 284
(Steve Aslanidis)		
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Unitravel Services		18 C.R.A.T. 453
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Value Vacations Limited	No jurisdiction	20 C.R.A.T. 595

BACHYNSKY INCORPORATED  
(BACHYNSKY FINANCIAL GROUP)

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
LUCIENNE BUSHNELL, Member  
MICHAEL HEWTON, Member

APPEARANCES;

RICHARD BACHYNSKY, its agent

EDWARD J. WREN, representing the Registrar  
under the Mortgage Brokers Act

DATE OF  
HEARING: 11 September 1990

Windsor

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar of Mortgage Brokers to refuse to grant registration of the Applicant as mortgage broker. The reasons given by the Registrar for his Proposal are that:

- (1) having regard to the financial position of the applicant, it cannot be reasonably expected to be financially responsible in the conduct of its business.
- (2) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on and in accordance with law and with integrity and honesty.

The facts, which are not in dispute, are as follows:

On June 6, 1989, the Applicant filed for registration as a mortgage broker.

The Applicant is a corporation whose President and sole director and officer is Richard W. Bachynsky.

On the first page of the application form, the term "applicant" is defined to mean "a sole proprietor, any partner of a partnership, or any officer or director of a corporation."

Question 6 of the application form (Tab B of Exhibit 3) reads as follows:

Are there any unpaid judgments outstanding against the applicant? If yes, submit a copy of each judgement: State amount outstanding and repayment arrangements.

The Applicant answered "No" to Question 6. As part of its procedure, the Registrar proceeded to an execution search and a credit check of the Applicant and its principal, Mr. Bachynsky. The results, thereof, indicated that there were nine outstanding judgments against Mr. Bachynsky relating to the period 1982 to 1984 and totalling approximately \$12,705.45.

All of these judgments relate to a business in a different field which Mr. Bachynsky carried on during 1981 and 1982.

Mr. Bachynsky was invited to give his comments on the results of the search and more particularly with respect to the outstanding judgments. He did so in a series of letters sent during June and July 1989 which can be found at Tab K, L, and N of Exhibit 3.

In these letters, Mr. Bachynsky gives no explanation for omitting to list the judgments in Question 6 and responding "No" to the question rather than "yes". Instead, he makes certain undertakings to satisfy these judgments in order to allow the registration proceedings to go forward. He also explains, after the fact, why he feels certain of the claims made against him were unfounded or for excessive amounts.

The Tribunal cannot review whether the claims were well-founded or not. It is bound by the judgments and must assume that the claims were valid.

Mr. Bachynsky affirmed that before answering "No" to Question 6, he first asked a clerk of the Registrar's office what the term "applicant" included and was informed that only the corporate entity was included and that, therefore, any judgments against himself personally were not to be mentioned. It was on the basis of this advice that he answered "No".

In cross-examination, Mr. Bachynsky was referred to the definition of "applicant" in the form and asked whether the wording was clear. He responded that it was. That wording specifically stated that the shareholder of a corporation was included in the word applicant. He went on to say, however, that applicant was defined to him as being only his corporation and that this was also a logical interpretation.

He was then referred to Question 3 of the application in which he was asked, "Has the applicant ever had a licence or registration of any kind refused, suspended, revoked or cancelled?" He had answered "No" to this question. He admitted that corporations could not be holders of driver's licences and, therefore, the question must have referred to him personally.

Similar observations were made with respect to the first two questions of the application to which Mr. Bachynsky had responded by answering for himself personally and not the corporation. Questions 4 and 5 were handled in a similar fashion.

These questions were clearly for historical background and, therefore, could only logically apply to the people behind the corporation rather than the corporation itself. The corporation itself could have no history since it only came into existence for purposes of obtaining and administering the broker registration.

Finally, Mr. Bachynsky admitted that none of the judgments had been satisfied despite his undertaking to do so.

The final witness was Ms. Gail Surtees, who testified that she has been an employee of the Applicant for the last three years. She spoke highly of the integrity of Mr. Bachynsky and said that he tried to settle certain judgments. She gave detailed testimony on the financial condition of the Applicant and Mr. Bachynsky personally. These indicated that the assets of both were substantially in excess of any liabilities. It is to be noted that the Registrar presented no evidence to support its claim that the Applicant was in a weak financial position.

It appears, rather, that the Registrar is treating the nine outstanding judgments amounting to \$12,707.45 as being indicative of a poor financial position, as well as the basis for believing that the applicant will not be financially responsible in the conduct of its business.

The same nine judgments form the basis for the Registrar's belief that the Applicant will not carry on its business in accordance with law and with integrity and honesty.

The failure to disclose the judgments would prove that it will not carry on the business with integrity.

The Tribunal believes that the Registrar has not proved that the Applicant is not in a financial position to conduct its affairs. On the contrary, the proof presented by the Applicant indicates that it has sufficient financial strength to conduct its business through the resources of the Applicant, as well as Mr. Bachynsky. In this regard, the Tribunal also notes that the Applicant has operated for more than three years with permanent and part-time staff. During this time, it has met its obligation to pay salaries, rent, and other debts. This is supported by the fact that except for the judgments relating to the 1981 and 1982 period, there have been no other judgments against the Applicant or Mr. Bachynsky. In this regard, the record of both are unblemished.

The Tribunal must lend more weight to the period of operations from 1986 to the present date, rather than the 1981-1982 period as being indicative of how the Applicant will operate financially.

This leaves one final ground to be examined: did the failure of the Applicant to answer Question 6 correctly and honestly in itself lead to the presumption that the business of the Applicant would not be carried on in accordance with law and with integrity and honesty?

At the outset, the Tribunal holds that it cannot accept the explanation given by Mr. Bachynsky for answering 'No' to Question 6. The Tribunal does not find it credible that any employee of the Registrar's office would have defined "applicant" to exclude Mr. Bachynsky personally. The wording on the application form is far too clear and the experience of the various employees such that such an explanation is not plausible. It is to be noted that Mr. Bachynsky did not call any employee of the Registrar as a witness. Furthermore, in none of the letters of explanation to the Registrar, did he ever raise this point. Instead, he simply listed the judgments and his explanation without ever stating that he had been given instructions not to list those judgments. Surely, if he had really been advised by the Registrar's office to answer "no" to Question 6, he would have insisted on this point in his letters to the Registrar's office.

The Applicant is well educated and intelligent. The wording of the definition of the term "applicant" is so clear, that it is inconceivable that Mr. Bachynsky did not realize that it included him personally as the operator, officer and director of the Applicant.



Mr. Bachynsky, therefore, failed in his duty to disclose the judgments in response to Question 6. This was a clear breach of the Act. But did such a breach justify refusing granting registration to the Applicant as a mortgage broker?

In his testimony, Mr. Bachynsky stated that while he may have failed to pay the nine judgments amounting to over \$12,000, he had still paid over \$100,000 of debts of his original business. This business ran into hard times during the 1981-82 recession and was forced to close its doors at that time. Mr. Bachynsky himself was during that period a very young man, approximately 24 years old.

This Tribunal has always stressed the importance of answering questions with respect to past judgments and driving offenses with honesty, clarity and completeness. The Tribunal refers the Applicant to the cases of Neil M. Kennedy (1989) CRAT p.307, Alan R. Lizotte (1989) p.318 and Robert Bruce Nimmo (1989) CRAT p.324. These judgments review extensively the case law of the Tribunal on this matter.

Counsel for the Registrar has argued that the Registrar is justified in revoking the registration of the Applicant because of the failure of Mr. Bachynsky to disclose the information required in the application.

The Tribunal notes, however, that in cases where the failure to disclose was considered sufficient to refuse registration, the non-disclosures were with respect to far more serious offences. In most cases, they involved tampering with trust funds or the removal of trust funds, or the non-disclosure of criminal offences and jail sentences.

Mr. Bachynsky has failed to pay over \$12,000 of judgments outstanding against him. It is to be noted, however, that many registrations have been granted where far more substantial amounts remained payable by the applicant or its principal. Mr. Bachynsky has never been charged with any crime nor has he ever been incarcerated. This should be contrasted with the cases of Peter Kodis (1985) CRAT and Frederick Bullock heard on November 24, 1988 which involved serious crimes and incarceration for those crimes.

The Tribunal believes that Mr. Bachynsky gave false information in his application and that this constituted a grave offence which reflects very seriously on his integrity and honesty.

The Tribunal shares the opinion of the Tribunal in the Bodon case (1984) Vol.13:

...that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of the applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgement. (page 258)

The Kodis case at page 190 underlined the importance of the application:

...Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion...

While the Tribunal believes that the past act of Mr. Bachynsky in giving a false answer to Question 6 of the application constitutes a serious breach that requires sanctions, the Tribunal does not believe that it warrants the refusal of the registration of the Applicant. The Tribunal is mindful of the decision of the decision of the Divisional Court in 1983 in the case of Brenner vs. Registrar of Motor Vehicle Dealers and Salesmen, where the Court held that:

..Unless the Tribunal can find that it (past conduct) does not (afford reasonable grounds), the Tribunal should not order the Registrar to refrain from carrying out his proposal.

The paramount duty of the Tribunal is to protect the public; the public must be able to deal with a mortgage broker who is honest and in whom they can trust. In the present case, Mr. Bachynsky has demonstrated since 1986, his honesty and ability in carrying out his business affairs.

It has been proved that he has operated an office with one full time employee and one to five part-time employees, paying their salaries as due, as well as paying for all the operations of the office. This is important because it demonstrates a long, more recent history of honoring his obligations. This is to be contrasted with the period of 1981-1982 where certain judgments were not paid. This period dates back more than eight years and, while important, cannot be given the same weight as the more recent period where there is no history of unsatisfied judgments.



In essence, Mr. Bachynsky had demonstrated a new, reliable pattern of behaviour.

The failure by Mr. Bachynsky to disclose the past judgments deserve some sanction. But the nature of the non-disclosure and the behaviour of Mr. Bachynsky since 1982 entitles him to receive registration as a mortgage broker subject to certain terms and conditions.

The Tribunal finds that the past conduct of Mr. Bachynsky does not afford reasonable grounds for the Registrar to refuse registration of the Applicant.

Therefore, by virtue of the authority vested in it under Section 7(2) of the Mortgage Brokers Act, the Tribunal directs the Registrar to refrain from carrying out its Proposal and to grant registration to the Applicant subject to the following terms and conditions:

1. No registration is to be issued until January 1, 1991.
2. Registration is to be issued only upon satisfactory proof to the Registrar that all outstanding judgments have been satisfied and that there are no other judgments against Bachynsky or the Applicant.
3. For a period of two years, the Applicant shall report every three months to the Registrar listing outstanding receivables and payables together with reconciled bank statements.

THE FALLONCREST FINANCIAL CORPORATION

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
MURRAY SUSSMAN, Member

APPEARANCES:

CATHERINE COULTER, representing the Applicant

EDWARD J. WREN, representing the  
Registrar of Mortgage Brokers

DATE OF

HEARING: 19 November 1990

Toronto

REASONS FOR DECISION AND ORDER

Upon hearing submissions and the Applicant having withdrawn his appeal, by virtue of the authority vested in it under Section 7 of the Mortgage Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

MORTGAGE CORPORATION, CANADA INC.

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MORTGAGE BROKERS

TO REFUSE TO GRANT THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
MURRAY SUSSMAN, Member

APPEARANCES;  
MARK A. KLAIMAN, representing the Applicant  
EDWARD J. WREN, representing the  
Registrar of Mortgage Brokers

DATE OF  
HEARING: 1, 12 June 1990 Toronto

DECISION AND ORDER

This matter coming on for hearing this 12th day of June 1990 in the presence of counsel for the Appellant and the Registrar, and the appellant now having abandoned this appeal, by virtue of the authority vested in it under Section 7 of the Mortgage Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

BROOKDALE MOTEL OF CORNWALL LIMITED  
(CORNWALL TRAVELODGE)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LOUNGE LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
THOMAS KROEGER, Member

APPEARANCES: THOMAS R. SWABEY, representing the Applicant  
ELLIOT CITRON, representing the Liquor Licence Board

DATE OF HEARING: 12 September 1989 Cornwall

REASONS FOR DECISION AND ORDER

"The Applicant operates a motel complex in the City of Cornwall under the trade name, Cornwall Travelodge. The motel has forty-nine bedrooms, a conference room with a capacity of twenty persons, a reception hall with a capacity of two hundred twenty persons, a dining room and lounge with a capacity for the dining room of eighty-four persons and for the lounge forty-four persons, and a disco lounge on the second floor of the premises (Jupiter Lounge) having a capacity of one hundred eighty-two persons." The above outline taken from the Applicant's Statement of Facts provides the description of the licensed premises which are the subject of this appeal.

The Liquor Licence Board of Ontario in its Notice of Proposal dated June 28th, 1988, had decided a 28 day suspension of licence to be appropriate for alleged infractions of the Act, particularly Section 44(1) of the Act and Section 8(5) and 8(6) and 923 of Regulation 581/80. For the purposes of this appeal, the allegation involving Section 923 of Regulation 581/80 has been withdrawn.

The Applicant requested a hearing before the Board which took place in Ottawa on February 15th, 1989 and resulted in the Board's decision to reduce the suspension to 14 days commencing March 6th, 1989. The Applicant now appeals to this Tribunal to vary this Order of the Board on the grounds that "having regard to the past good record and the lack of any deliberate intention by the Applicant to break the provisions of the Liquor Licence Act,

the Applicant seeks an order suspending the imposition of any penalty upon the Applicant".

It is agreed between counsel that we are concerned only with the evidence as it applies to paragraphs 1, 2 and 3 of the Notice of Proposal, paragraph 4 having been withdrawn. They are as follows:

- (i) Contrary to section 44(1) of the Liquor Licence Act, the licence-holder did knowingly sell or supply liquor to persons under the age of 19 years; or
- (ii) Contrary to subsection 8(5) of revised regulation 581/80 under the Liquor Licence Act, the licence-holder permitted persons under, or apparently under, the age of 19 years to enter or remain upon licensed premises; or
- (iii) contrary to subsection 8(6), the licence-holder failed to ensure that evidence as to the age of persons satisfactory to the licence-holder was obtained prior to permitting a person apparently under the age of 19 years entry to premises not prescribed by section 51.

With regard to the offense in paragraph (i) under Section 44(1) of the Act, we find on the evidence neither sale to nor consumption of alcohol by the minors present in the tavern at the relevant times and, therefore, the allegation of any infraction under Section 44(1) of the Act has not been proven and must fail.

The evidence of the infractions alleged in paragraphs 2 and 3 of the Proposal, however, is uncontroverted and corroborated by the four police officers who testified. On February 5th, 1988, in a routine attendance at the Jupiter Lounge, the police encountered three young girls at a table; all of whom were under the age of 19 and one of whom looked very young, perhaps no more than 14.

In our view, the law is clear in the interpretation of Section 5 and Section 6 of Regulation 581 in that they constitute strict liability against the tavern owner to ensure persons

apparently under the age of 19 do not enter the premises and further to ensure satisfactory evidence of age is produced.

In the case of the Morrissey Tavern (1988) C.R.A.T. at p.55, the Tribunal dealt with this issue:

The Section reads "every holder of a licence shall ensure..." In our opinion, the words "shall ensure" create a strict liability on the owner as defined by Dickson J. in Regina vs. City of Sault Ste. Marie 1978, 40 C.C.C. (2d) p.353.

Trainor J. in Regina vs. Z-H Paper Products Limited 1980 27 O.R. (2d) p.570, adopts the Oxford dictionary meaning of "shall ensure", to make certain, to make safe against risks. Adopting this criterion can the Tribunal find that Mr. Dongas used all reasonable means available to him to make certain the incident of February 24th, 1986 would not happen?

There is only one entrance to the Jupiter Lounge and three fire exits. It cannot, therefore, be maintained that patrons were coming in from several entrances at the same time making it difficult for the doorman to obtain identification. The offense is clearly established and we so find.

In mitigation, we must consider that the Tavern appears to be generally well operated and that this is a first offense. It appears from the evidence that strict instructions had been issued by the owners to the employees with regard to identification of patrons and on the two occasions before us, they were not strictly complied with.

We regard the penalty exacted by the Liquor Licence Board, however, as being more severe than that called for under all the circumstances. We would, reduce the suspension to a period of two days instead of the fourteen imposed by the Board.

By virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal directs the Liquor Licence Board to suspend the licence of the Brookdale Motel of Cornwall Limited (Cornwall Travelodge) for a period of two days which times and dates are to be set by the Board.

CENTRETOWN CITIZEN'S COMMUNITY ASSOCIATION

IN THE MATTER OF  
PEPPER'S RESTAURANT (ELGIN STREET) LTD

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO GRANT THE REAR PATIO DINING ROOM  
LICENCE WITH CONDITIONS

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
ROBERT COWAN, Member

APPEARANCES:

JAMES MACKENZIE, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

MICHAEL SWINWOOD, representing Peppers Restaurant

ALDERMAN D. HOLMES, Party

DATE OF  
HEARING: 18, 19, 20 June 1990

Ottawa

REASONS FOR DECISION AND ORDER

The preference of the Tribunal would normally be to consider this well presented appeal and take some considerable time to review it and render a written decision. On the other hand, we have listened very carefully to the submission by Mr. Swinwood with respect to this particular application and appeal, and recognize that in fairness to all concerned, that if a decision is to be made with respect to an outdoor patio, it might take up to perhaps a month or so to prepare an appropriate decision and that would not be fair to either the Applicant or to the objectors given the fact that this matter has been before the Liquor Licence Board and now this Tribunal since May of last year. On the basis of that, the Tribunal has decided that we will render orally a decision on this matter.

First of all, on behalf of the Tribunal, we would like to commend counsel. This presentation on behalf of both counsel has been perhaps one of the best presentations that we have seen. It has been fair. It has been objective. The arguments have been well reasoned and we are most impressed with the presentation of counsel.



We also want to commend the witnesses who have presented their evidence, both on behalf of the objectors and on behalf of the Applicant. Again, we were most impressed by the fact that the witnesses, on behalf of the objectors, attempted to be as fair as they possibly could, given, of course, their admitted bias with respect to the particular application. And this is something that has not always happened in presentations to the Tribunal, so we do wish say to the witnesses on both sides how much we appreciate their fairness and reasoned attempt at objectivity.

We are also impressed with the fact that the community has galvanized itself into a state of readiness and preparedness, and it has, in fact, taken upon itself the task of dealing with the municipal authorities and achieving a holding position for the Elgin Street community. In particular, we would cite the fact that the community has obtained an Amendment to the existing zoning By-law, so that the particular concern of the staff approval will not occur in the case of Elgin Street.

We are also very much impressed with the fact that the community has caused the City of Ottawa to look very objectively at such matters as parking, patios overlooking open spaces, and other matters of land use. We do not particularly want to comment upon the fact that the City of Ottawa in the past has accepted money in lieu of parking which may, in fact, have exacerbated some of the problems of which the residents have complained.

Given all of that, however, we have to consider as a Tribunal, a number of the decisions which have gone before us. In particular, I would like to refer to a decision which was not cited by either counsel, but which has been cited on many occasions dealing with the duty of the Tribunal. That is a case in the Divisional Court styled Re: Brenner, which was a Motor Vehicle Dealers application case.

In that decision, Mr. Justice Southey directed the Tribunal not lightly to overturn a regulatory process on the basis of apprehended fears or in the case of the Re: Brenner matter, apprehended rehabilitation - future concerns. In that regard, this Tribunal considers that we are bound by the decision of the Divisional Court.

It is true that the hearing before us over the past three days has been a hearing de novo, but, nevertheless, we have to consider that the hearing before the Liquor Licence Board in 1989 was a full hearing at which many of the concerns expressed here to us over the past few days were also expressed. It, therefore,



behooves us not lightly to overturn the recent decision of the Liquor Licence Board in that instance.

We look particularly to the situation of this particular Applicant. This is not an application for a new licensed premises. Evidence has been presented to this Tribunal that the existing licensed premises consisting of some 248 seating is, in fact, a well-run establishment. There have not been problems, other than the one that was identified with regard to the general operation of these premises, and that the application is simply for an extension of the existing premises. If this were for a bar licence or if it were for something that was new, we would have much greater concern. In fact, it is an application for an extension of a dining lounge licence and the general public in this Province look to have, as far as dining is concerned an opportunity to consume alcoholic beverages with their meals.

The emphasis, both in the evidence of Mr. Nesrallah and in the presentation before this Tribunal, was that this application would refer to premises which would be principally in the food serving business. And that weighed very heavily upon the Tribunal. It was a concern in the Bloor Street Diner case which was the converse.

We also are concerned about the fact that this Applicant had achieved in law, all proper permits for the construction of this patio. The Tribunal recognizes the concerns of the public, it recognizes the concerns of the residents in the community; it recognizes the fact that, had they been aware of the application, they might very well have opposed it. And if they had opposed it and been successful in their opposition, even though it had been at staff level, then the Applicant would at his peril have proceeded with the construction.

But the Tribunal has to look at the fact, the Applicant did proceed in a legal manner as the law stood in the City of Ottawa in 1989, the spring of 1989, the Applicant followed the law. It may be that the community citizens would have like to have had an opportunity to comment, I am sure they would have, and had they known of the Applicant's plans, they might very well have taken some steps, but the Tribunal feels that the Applicant cannot be faulted for having proceeded in accordance with law and upon obtaining his permits, proceeding with construction and obtaining his Occupancy Permit.

Given that and given the acknowledgement of Mr. Kulis on behalf of the Liquor Licence Board, that all permits were in place at the time of the application or at the time of the hearing of the Liquor Licence Board, this Tribunal feels that it has to look very

carefully at the provisions of Section 6 of the Liquor Licence Act which given to the Applicant, a right unless and its a very big unless, to be issued a licence.

In that regard, the Tribunal says to itself, what are the objections to the operations of this particular Applicant? He is not operating in isolation; he must be looked at specifically, but specifically in conjunction with the operation in the community as well. No evidence was put forward to show that this Applicant is not operating in a proper manner, and that he will not continue to operate in a proper manner in the future.

Therefore, it is important to this Tribunal in assessing the needs and wishes of the community, that those needs and wishes be related directly to this particular establishment. Having said that, the Tribunal also wants to go further and agree that Section 6(1)(g) is not to be narrowly interpreted. Matters of parking, noise, rowdiness are all important matters even though they are regulated elsewhere within the municipality; they are important matters to be dealt with in considering the public interest.

The final matter that needs to be addressed by the Tribunal is the question of saturation. The Tribunal's view is that this is a valid concern to be put forward by the community. The problem that the Tribunal faces is interpretation of what is saturation. We have had presented to us the fact that there are some more than 3,600 authorized seating capacity permitted in this Elgin Street area. Is that the determination? Will another 62 create an over saturated position? What about the number of establishments that are related? What about the types of establishments? We have heard the subject of disco operations; we have heard the subject of the operation of Maxwell's as a "younger" place; we have heard of the operation of this particular establishment. Is that perhaps a more specific item to be looked at? In fact, in the Bloor Street Diner case that was a major consideration that was looked at; the number of licensed establishments and the nature of those establishments. The Tribunal is concerned about saturation, but it is very difficult for us to determine whether that saturation point has, in fact, been reached with respect to Elgin Street at this point in time.

The Tribunal views the fact that the residents have now established some major controls in this area is a significant factor that will deal, we suggest, with the question of saturation in the future. The community organization appears to be well organized, well prepared to meet with the Merchant's Association. In fact, the Merchant's Association in the evidence has now been created to deal with the particular concerns of the immediate residents. The Tribunal considers that to be a healthy development

in this area, so that all of the residents and merchants can work together to make sure that appropriate controls apply in this particular street and at this location.

Under the circumstances, therefore, the Tribunal has decided that by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 25th day of October, 1989.

DEA-DAY HOLDINGS LTD  
(JOHN SCOTT HOTEL)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LOUNGE LICENCE  
FOR A PERIOD OF SEVEN BUSINESS DAYS

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
TERESA D. HUEGLE, Member

APPEARANCES:  
LARRY D. N. SMITH, representing the Applicant  
STEVEN A. GRANNUM representing the Liquor Licence Board

DATE OF  
HEARING: 17 July 1990 London

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 5th day of July, 1989, with suspension to be from September 4 to 10, 1990 inclusive.

JOHN FRIENDLY and KAREY SHINN

IN THE MATTER OF  
TUGGS INCORPORATED  
(THE BOARDWALK BISTRO)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO GRANT THE DINING ROOM AND PATIO DINING ROOM  
LICENCES AND TO ATTACH THE FOLLOWING TERM AND  
CONDITION TO THE LICENCE

- the sale and service of liquor shall cease  
at 11:00 p.m. daily;

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
ROBERT COWAN, Member

APPEARANCES:

JOHN FRIENDLY	- Applicant
KAREY SHINN	- Applicant
RICHARD E. KULIS	- representing the Liquor Licence Board
RUSSELL D. CHEESEMAN	- representing Tuggs Incorporated
RAYMOND M. FEIG	- representing the City of Toronto
SHARON HICK	- Party
ANITA HACKENBERGER	- Party

DATE OF

HEARING: 20, 21, 27, 28 February 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Liquor Licence Board of Ontario dated December 7th, 1989, whereby the Board granted a Dining Room Licence and Patio Dining Room Licence to Tuggs Incorporated in respect of the premises operating at the Boardwalk Bistro, Toronto.

The appeal to this Tribunal was instituted by John Friendly and Karey Shinn, who were originally made parties to the hearing before the Liquor Licence Board pursuant to subsection 12(3) of the Liquor Licence Act. The Applicants are resident of an area in relatively close proximity to the Boardwalk Bistro and opposed the issue of the licences on the following grounds:

1. The issuance of the licences was not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.  
Section 6(1)(g) of the Liquor Licence Act.
2. The City of Toronto did not have the power to acquiesce to the issuing of the licences because the establishment was located in a public park controlled by the City of Toronto.  
The Applicants argued that the issuance of such a licence is prohibited by the Public Parks Act.

When the case began on the merits, Mr. Friendly asked that any member of the general public in the courtroom who wished to testify should come forward as the first witness in the hearing. No person stepped forward in response to his summons. Mr. Friendly, therefore, proceeded to call his own witnesses in support of his case.

The first witness was Karey Shinn. She testified both as a witness and party to the proceedings.

She stated that she was against the issue of licences to the Bistro because its premises were located in a city park controlled by the City of Toronto. She claimed that no public establishment located in a public park of the City had ever been granted a liquor licence. Issuing a liquor licence to the Bistro would set an undesirable precedent; public parks should be free of alcohol.

She stated that she agreed with licences being issued to restaurants in commercial zones.

She also argued that the Bistro was not a restaurant, but rather a refreshment room and, therefore, did not qualify for a licence under the Liquor Licence Act.

She also stated that studies show that there are already sufficient restaurants serving alcohol in the area.

She was afraid that granting a liquor licence to the Bistro would encourage alcoholism and make the park in which the Bistro was located unsafe.



Ms. Shinn produced letters of area residents (numbering 104) which opposed the granting of the liquor licences. Ms. Shinn resides in the community which is in closest proximity to the park. She also submitted a petition containing 120 signatures together with 15 letters from City of Toronto neighbourhood Associations, four of which were located in the vicinity of the park.

It is to be noted that not all letters from the Associations were signed and those signed were signed by simply one officer. It is not clear, therefore, that the letters themselves were authorized by the members of each Association. In any case, the opposition, in general, was the fear that the issuing of the licences would establish a precedent which would lead to all parks in the City of Toronto eventually allowing the sale of alcohol.

Ms. Shinn's testimony was interrupted by consent of the parties in order to allow Mr. Jack Layton to testify. Mr. Layton, City Councillor representing Ward 6, testified that he had been going to the Beaches for years and that in summer, he biked along the Martin Goodman trail.

He testified that he was Chairman of the Board of Health which advises the Toronto City Council on matters relating to public health. He stated that the Board of Health recommends that the sale of alcohol not be permitted in public parks.

He himself is concerned by the sale of liquor in public parks because alcohol creates diseases and social problems. It would make parks less desirable if the sale of alcohol were permitted.

In cross-examination, Mr. Layton stated that policy in public parks with respect to alcohol is within the jurisdiction of city council and not the Board of Health.

Mr. Layton testified that he agreed to allowing the issue of licences to sell alcohol in a public park for special occasions.

Mr. Layton was asked about the Balmy Beach Club on the Boardwalk which is licensed. Mr. Layton answered that the Club was not open to the public. This was also the case with the Ashbridges's Bay Yacht Club and the Boulevard Club.

Mr. Layton agreed that licensed facilities are allowed on Metropolitan Toronto parkland.

He further testified that he was not against the selling of alcohol at the SkyDome, but only in public parks. He has taken his son to restaurants where alcohol is served.

Ms. Shinn then continued her testimony in cross-examination. She stated that she sent out approximately 400 form letters asking residents to oppose the issue of a liquor licence and that she received 168 signatures.

The lawyer for the City of Toronto, a party in the case, asked Ms. Shinn to consult Section (1)(o) of the Liquor Licence Act Regulations which defines a restaurant as being "an establishment that has full kitchen facilities for the preparation of meals".

The next witness was Marion Bryden, M.P.P. for Beaches Woodbine. She testified that she lived in the area and had written letters contesting the Bistro's application for a licence on the grounds that it was against the public interest. She stated that there would not be enough public parking for such a restaurant if a licence is granted and that it constituted an inappropriate intrusion in public parks creating a serious precedent.

She testified that the park in which the restaurant was located was a regional park to which people from outside the area also came.

She stated that she had sent a letter to 3,600 homes in the area closest to the park asking that they sign a form letter opposing the issue of a liquor licence. She received letters containing 250 signatures; some letters were signed by more than one member of a household.

She calculated the percent response by taking the number of signatures as the numerator and the number of households as the denominator giving a response ratio of 7%, which she considered high.

She claimed that she was not against Special Occasion Permits being granted in public parks, even though this would result in the consumption of alcohol. Her rationale was that the City of Toronto would have to approve each permit. (It is to be noted that the City of Toronto had to also approve the Bistro's obtaining a liquor licence.)

Ms. Bryden stated that she never polled her constituents, 45,000 residents, to determine whether they supported or opposed the granting of a liquor licence. Her sole role had been to invite constituents to contest the issue of a licence by signing the letters she had sent to them.



The next witness was Debbie Hoshko, acting park coordinator of Administrative Services for the City of Toronto Parks and Recreation Department. She testified that her job included concessions and leases, including the Tugg agreement.

She testified that the Bistro did not obtain prior approval from the City of Toronto for a Special Occasion Permit which it had received from the Liquor Licence Board for a Lion's Club function held February 6th, 1990. Furthermore, the Bistro obtained seven additional Special Occasion Permits from the Liquor Licence Board without getting prior approval from the City of Toronto.

She first learnt of these permits on February 21st, 1990 and was very disturbed. She checked with the permit section of the City of Toronto which said that it was unaware of the permits and she then spoke to the Legal Department. At this date, the matter is with the Acting Commissioner of Parks and Recreation and is, therefore, out of her hands.

In cross-examination, she testified that the contract with Tuggs is the first of its type with respect to the sale of alcohol on Toronto parkland administered by the City.

She also stated that under section 8(e)(v) of the contract, the City was entitled to revoke the Bistro's right to sell wine and beer at will.

The next witness, Mary Campbell testified that she knew of no public facility which is licensed in a park under the control of the City of Toronto, except for the Bistro.

The next witness, Colleen Weir, a resident of the Beaches, opposed the liquor licence being granted because it would affect safety in parks. She testified that many people can only afford to go to public parks for their entertainment and that this last right could be effectively destroyed if they do not feel safe.

She feared that drinking alcohol in a restaurant will lead to a decrease in safety because of the potential for patrons of the restaurant becoming drunk and disorderly.

The next witness was Sandra Bussin, School Trustee for Wards 9 and 10. A resident of Ward 10, who uses the park, she felt it was not an appropriate place for liquor to be served. In cross-examination, she testified that the Toronto Board of Education has taken no position on whether a liquor licence should be granted.

She also stated that she takes her children to restaurants which serve alcohol, such as the Swiss Chalet. She said that she would continue to use the park with her daughter even if a liquor licence were granted.

The next witness, Herb Pirk, Commissioner of Parks and Recreation for the City of Toronto, testified that the restaurant is located in what is called a district park because it serves people from all over the City of Toronto. It is also a local park because so many homes are close to it.

He testified that Mr. Foulidis, the proprietor of the Bistro, had told him that he would not apply for a licence to serve alcohol. He stated that he would agree to the Bistro being allowed to receive Special Occasion Permits because City Council would have to agree to each one first.

When asked about Metropolitan Sunnybrook Park which contained an establishment licensed to serve alcohol, he stated that the park was more isolated and away from residential areas. In cross-examination, Mr. Pirk testified that a Special Occasion Permit had been granted in June 1989 to Centre 55, a community centre, for an event which was held directly on park land adjacent to the Bistro.

He also stated that the closest residence to the park was one-half a kilometre away.

Mr. Pirk stated that he was in agreement with Special Occasion Permits because they are for celebrations and, therefore, do not encourage abusive drinking, but he did not know whether people drink more at a restaurant than at a celebration.

The next witness was Ms. Sharon Hick, a party to the proceedings under Section 12(3) of the Act. She testified that she lived in the area and was involved in community issues. She objected to the issuance of a liquor licence to the Bistro only because it was located in a park. She would not have objected if it were located on Queen Street. She testified that a city park serves people of all ages and that the licensing of the restaurant would make the restaurant more an adult venue rather than a place for the family. She was concerned about drinking on the patio of the Bistro which she anticipated would become "a drinking spot" after 9:00 p.m.

She feared the possibility of encountering people who may have drunk excessively and become abusive.

She acknowledged that people using the park often come from restaurants along Queen Street which serve alcohol.

She believed that park users who wanted to consume alcohol with their meal should go up to Queen Street, a kilometre away as the crow flies.

In cross-examination, Ms. Hick stated that Foulidis operated a "nice" restaurant.

She stated that her real concern was for the potential danger of people who drink too much and become irresponsible. She also stated that problems of bad behaviour that she had encountered were with people coming out of pubs and taverns and not restaurants. She was afraid that the patio of the Bistro restaurant would become similar to a beer garden or pub.

Ms. Anita Hackenberger was the final witness on behalf of those opposing the issue of the liquor licence. She was made a party to the application pursuant to Section 12(3) of the Liquor Act. She testified that she used the park daily and that it is a unique area, because it is accessible to the public, but also remote. She has seen "bad things" there, including drunkenness and drugs. She stated that many parties take place along the beaches.

She had spoken to policemen who stated that the area is already undermanned. She felt that giving a liquor licence will only add to the police problem. It would also encourage drinking.

This concluded the case by the opponents of a licence and which took more than three days to make. The defence then began their case.

The first to testify was Mr. Pat Burke, Manager of Plan Examination for the City of Toronto. His duties included accepting applications for building permits.

He testified that the City issued a Building Permit to the Bistro which was permitted to function as a refreshment room and to sell alcohol. He had visited the Bistro and it satisfied the definition of "refreshment room".

He stated that he lived in the area and as a resident had no problem with the Bistro's receiving liquor licences. He stated that he is not a drinker and has two daughters, but is still "not bothered one bit" by the Bistro being licensed. He did not feel that it would add any problems to the park.

He was of the opinion that the Bistro came within the definition of "restaurant" under Section 1(o) of the Liquor Licence Act.

Mr. Burke has been employed by the City of Toronto for 34 years and for 15 years has been dealing with building by-law applications.

In cross-examination, he stated that the Bistro satisfied the definition of a refreshment room, even though it could be defined as a restaurant under the Liquor Licence Act. The City of Toronto was not bound by the definition under the Liquor Licence Act, nor was the Liquor Board bound by the City's definition of a refreshment room. He further stated that a refreshment room did not lose its character of refreshment room because it served liquor.

The final witness was Mr. George Foulidis, the President and sole shareholder of Tuggs Incorporated. He testified that he completed construction of the improvements in the restaurant on March 23rd, 1989, and began operating it on that date. He applied for a liquor licence in the summer of 1989.

He testified that his request for a liquor licence was pursuant to the desire expressed by many patrons for wine or beer to be served with their meals. Some were disappointed when they learned they could not be served wine or alcohol. He applied for a beer and wine permit and not hard alcohol as well, because patrons would be easier to handle and it would be less detrimental to the park.

He produced approximately 80 guest cheques containing requests for a liquor permit. He claimed that these 80 requests were unsolicited by him.

For purposes of the Liquor Board hearing, he began to invite patrons to sign a petition seeking the issue of a liquor licence. Over 2,900 people signed the petition, although some duplications may have occurred.

He stated that 80% of the signatories of the petition came from outside the immediate area of the park. He also testified that since the restaurant served people already visiting the park, it did not advertise in any of the City newspapers such as the Toronto Star or the Globe and Mail, nor on radio or television. His business depended solely on people who were already in the park.

He testified that the Bistro had a varied operation, ranging from a snack bar to a fine food restaurant, to a patio with a barbecue. He said that he had spent almost two million dollars for the construction and equipment of the Bistro. The building itself would revert back to the City without his receiving any compensation after fifteen years of operation. The City would receive as well, 8% of gross revenues on the sale of wine and beer, as well as a rent beginning at \$40,000 per annum in the first year and increasing over the following fifteen years.

He testified that a TTC bus stop existed adjacent to the Bistro and was in operation from April to October. Furthermore, there was a bus route along Lakeshore Blvd. all year round with stops which were not far away from the restaurant. He testified that there are 760 parking spaces in the lot, very close to the restaurant.

He stated that he had never had any problems with the Liquor Board with respect to any restaurants which he had operated.

In cross-examination, Mr. Foulidis stated that he was not required to spend one and a half million dollars for construction of the restaurant. He chose to do so because of the restaurant he was trying to create.

Because he was in a dispute with the City of Toronto with respect to the issuance of special occasion liquor permits, he refused to answer certain questions. He was legally entitled to do so. It is to be noted that despite any problems that he might have with the City of Toronto as a result of the Special Occasion Permits, the City of Toronto continued throughout the hearing to support his being issued a liquor licence permit.

The main issue for this Tribunal to decide is whether the issuance of the liquor licences applied for is or is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

Under Section 6(1) of the Liquor Licence Act, the general rule is that a person is entitled to a liquor licence subject only to certain exceptions, one of which is contained in Section 6(1)(g). Since the general rule is entitlement, the exceptions must be interpreted restrictively.

The case of Elm Flambeburger (1987) CRAT Volume 16, p.103, set out useful guidelines in applying Section 6(1)(g) of the Act.



First of all, the case held that since a person is entitled to a licence the onus is on the objector to prove that it is not in the public interest to issue one. Public interest contains two elements: needs and wishes.

It further held that needs and wishes will not be decided solely on the basis of a head count. The concerns must be bona fide.

Finally, it held that the needs and wishes of the immediate residents would be given more weight than those from outside the area who are more of a transient nature.

In this regard, it is to be noted that the park at the Beaches is designated as a District Park and it is generally recognized that many, if not a majority of its users, come from outside the immediate area.

If objections were based on issues such as noise and parking, then the views of the immediate residents would have significantly more weight. Since, however, the general question was whether a precedent should be established allowing the service of alcohol in a public park, all users of the park are affected equally. In that sense, needs and wishes extend to a far broader group of residents than in the immediate area. For the purposes of this case, the immediate residents are the residents of the Municipality of Toronto.

This is especially the case given the relative remoteness of the park from any residential area. It was proved that the nearest residence was at least one kilometre away. The park, moreover, contains a parking lot with a capacity of approximately 700 cars. To both the east and west side of the restaurant is parkland and beach; Lake Ontario lies to the south. There are no residences to the west of the restaurant that would be effected since the Ashbridge's Yachting Club and Toronto Hydroplane Yachting Club are both to the west of the restaurant.

The closest residences to the east would be approximately one kilometre away or immediately past the Summerville pool, stretching north on Woodbine Avenue. The entire block north of the restaurant is occupied by the Greenwood Race Track which contains licensed premises and parking for thousands of cars.

The objections, therefore, really relate to the broader public issue of the appropriate use of a public park, as well as the fear of an adverse effect upon park users occurring should the restaurant be allowed to sell wine and beer.

It is to be noted that the Liquor Licence Act contains stringent penalties to restaurants which serve an abusive quantity of alcohol to patrons or which serve any alcohol to minors. Given that the Bistro is located in a public park, it is to be expected that Mr. Foulidis will be very careful in exercising his rights since he will be monitored closely by his landlord, the City of Toronto and by the Liquor Licence Board. Any complaints at all, could lead to the City of Toronto exercising its arbitrary right to revoke his right to sell liquor on the premises.

As previously stated, issues of needs and wishes are not decided solely on a head count. In the present case, some three to four hundred individuals strongly opposed the application of the Bistro for a licence and some twenty letters from various Resident Associations also were opposed. On the other hand, more than 3,000 people supported the granting of liquor licences to the Bistro. This demonstrates an extremely wide base of support for the licensing of the Bistro from within the community of the Municipality of Toronto.

It is true that the granting of liquor licences to the Bistro establishes a new precedent for the use of city parks under City of Toronto control; however certain parks operated by the Metropolitan Council of Toronto already allow licensed establishments.

In this regard, it is to be noted that no witnesses were brought by those who opposed the issuance of a licence to show that since the issue of liquor licences in Metropolitan parks, there had been an increase in disorderly conduct, violence or bad behaviour.

In addition, no proof was made showing that the Applicant or Mr. Foulidis had ever behaved wrongfully in the past or that Mr. Foulidis had ever promoted drunkenness or unruliness. Quite the contrary, it appears that at all times, Mr. Foulidis has always behaved in an exemplary fashion while in possession of a liquor licence.

While granting a liquor licence to an establishment in a City of Toronto park may be a precedent, this in no way hinders the City of Toronto from doing so. The City is entitled to change its practices so long as it has the authority to do so under its constituting by-laws.

In our contemporary, sophisticated society, should anyone be shocked at the notion of a restaurant serving either wine or beer with meals? All the witnesses agreed that they took their children to restaurants where alcohol was served. In this day and age, one expects a restaurant serving fine food to also serve wine.

Would it be fair to force park patrons desirous of having a meal with wine to leave the park and walk for one kilometre to find such a restaurant?

People wanting to get inebriated, are not likely to go to restaurants to do so. Drinks are far more expensive than they would be in a pub or tavern and the food only adds to the overall cost. It is, therefore, unlikely that patrons of the Bistro will do so provided that the first vocation of the Bistro remains being a restaurant.

For this reason, the Tribunal believes that if the Bistro is entitled to its liquor licences, the public is also entitled to the assurance that Mr. Foulidis will operate his restaurant as a restaurant and not as a tavern, beer garden, or entertainment venue. Mr. Friendly and the others who opposed the issue of the Permits have raised a valid concern in this regard. Therefore, the Tribunal will order the issue of the Permits only subject to certain conditions which protect and assure the vocation of the Boardwalk Bistro Restaurant and Patio.

The second argument dealt with whether the City of Toronto could allow the Bistro to have a liquor licence issued. Mr. Friendly and the others argued that it was prohibited from doing so by the Public Parks Act. They cited Section 11(3) of the Public Parks Act, R.S.O. 1980, Chapter 417 which reads as follows:

- 11.(3) The board (of Park Management) has power to license cabs and other vehicles for use in a park, and to let from year to year, or for any time not exceeding ten years, the right to sell refreshments, other than spirituous, fermented or intoxicating liquors, within the park under such regulations as the board shall prescribe.

The Tribunal does not agree with Mr. Friendly's interpretation of Section 11(3). The Tribunal holds that the meaning of Section 11(3) is clear: the City of Toronto does not have the power to let the right to sell alcohol within a public park because such power has been delegated by the Province of Ontario to the Liquor Licence Board. Solely the Liquor Licence Board has the right to permit the sale of alcohol in an establishment.



The City of Toronto only has the power to tolerate the sale of alcohol on premises which it leases. The right to sell alcohol will, therefore, come into effect only when the lessee obtains a liquor licence from the Liquor Licence Board, providing the City agrees to the lessee seeking such a licence.

To interpret Section 11(3) as being a blanket prohibition of the sale of alcohol is to interpret the section far too restrictively. In this regard, one should take note of Section 18 of the Provincial Parks Act. The Section states:

18. No licence or other authority shall be issued for the sale of liquor as defined in the **Liquor Control Act** in a provincial park.

Section 18 could not be clearer. Surely, if the same had been intended under the Public Parks Act, a similarly worded section would have been drafted. A prohibition of this type cannot be ambiguous; it must be clearly and unequivocally stated. This is not the case with Section 11(3).

In this regard, it should be noted that it is because the City has the power to license cabs, that it becomes logical to state that it does not have the power to let the right to sell alcohol; such power belongs solely to the Liquor Licence Board. Surely, it was to prevent anyone from interpreting the "right to sell refreshments" to include the right to sell alcohol in City parks that this wording was used. Otherwise, one might have been able to argue that the City, and not the Liquor Licence Board, had the power to issue licences for the sale of alcohol in a city park.

Finally, in interpreting the application of Section 11(3), the Tribunal is mindful that it should "lead to the interpretation which would support existing rights" of the City of Toronto. As stated in C.D.E. (Ont.) 3rd Ed. Vol. 31, title 136 at 167,

It is presumed, that where the objects of an act do not obviously imply a contrary intention, the legislature does not desire to confiscate the property or to encroach upon the rights of persons; and it is therefore expected that, if the contrary is intended, it will be made manifest, if not in express words, at least by clear

implication and beyond reasonable doubt. If the statute is ambiguous, the court should lean to the interpretation which would support existing rights.

For the above reasons, the Tribunal holds that the City of Toronto was within its power to tolerate the sale of alcoholic beverages on its premises in a city park provided that Tuggs Incorporated obtained a liquor licence for its restaurant and for its patio from the Liquor Licence Board.

While the Tribunal will order the issue of the licence permits by the Liquor Licence Board in favour of Tuggs Incorporated, it will do so subject to certain conditions in order to satisfy certain concerns raised by Mr. Friendly and the other opposing parties. The Bistro Restaurant and Patio must not become an operation which resembles a pub or tavern. This could certainly lead to users of the park, including children, being threatened or disturbed.

In addition, park users have a right to an environment which is free of excessive noise. To achieve this, the Bistro should not be permitted to play loud music.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal directs the Liquor Licence Board to issue the liquor licences it granted in favour of Tuggs Inc., and subject to the same condition imposed by it, the whole subject to the further terms and conditions herein set out:

1. There shall be no stand-up area in the Boardwalk Bistro.
2. There shall be no dance floor in the establishment.
3. There shall be no nude or exotic entertainment.
4. There may be light entertainment.
5. There shall be a maximum of eight stools at the bar.

PEPY'S DINING LOUNGE INC.  
(PLAYMATE)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND ALL LIQUOR LICENCES  
FOR A PERIOD OF FOURTEEN DAYS

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
THOMAS KROEGER, Member

APPEARANCES:  
JOHN J. CARDILL, representing the former owner  
T. GRIEVE, representing the current Licensee  
RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF  
HEARING: 14 May 1990 Ottawa

REASONS FOR DECISION AND ORDER

On January 30, 1989, the Liquor Licence Board of Ontario issued a Notice of Proposal to revoke Licence No. 090526 for a tavern premises of 72 persons capacity known as "Playmate" at Pepy's Dining Lounge, 177 Montreal Road in Vanier, Ontario. The Notice was directed to Giuseppe Bentivoglio and Franco Bentivoglio, the officers, directors and shareholders of the licensee corporation; and referred to breaches of two Regulations breached by the Licence Holder. These were pursuant to Section 8(1) and 8(10) of Revised Regulation 581/80 wherein liquor was kept for sale in the licensed premises which was not purchased from the Liquor Control Board of Ontario and adulterated liquor was kept for sale in the licensed premises.

The hearing before the Liquor Licence Board took place on May 19, 1989, and evidence was presented as to the results of a police raid on the premises and of the chemical analysis of certain found alcohol products which the Board accepted. Some bottles had American labels, while others tested below 40% alcohol which is the standard for items obtained through the Liquor Control Board of Ontario.

Giuseppe and Franco Bentivoglio were witnesses at the hearing and their excellent eighteen year record and complete lack

of any personal involvement in the event resulted in a fourteen day suspension rather than in revocation of the licence.

The Bentivoglios operate nine licensed premises and the two managers of the Playmate were fired as soon as the raid occurred. One of them was later convicted, fined \$50,000 and sentenced to a year in jail for the events.

The Board's decision stated:

During submissions, considerable argument was put forth with respect to absolute liability regarding the infringed regulations. The Board is satisfied that Licence Holders are liable for the acts of persons to whom they have delegated their responsibility in their absence, as outlined in the Ontario Court of Appeal Decision in Regina V. Stevanovich 43 O.R. [2d] 266. The Board rejected the argument put forward by the Licensees' there was complete delegation of authority and although the Licence Holder is entitled to do so, it must also accept the responsibility when their trust is misplaced. The Licensees did not dispute that serious and significant illegal activity was being carried on by their manager(s). This illegal activity represents a serious breach of a term and condition of the licence as the public is entitled to rely upon the quality control measures of the Liquor Control Board of Ontario.

The Board is not satisfied, however, that this is a case for revocation as the disposition must be tempered by the fact that the Licensees have been Licence Holders for some eighteen (18) years without difficulties before this Board and in fact had no personal involvement in these contraventions. Accordingly, at the conclusion of the Hearing on June 5, 1989 the Board gave an oral decision and ORDERED that all liquor licenses of the premises operating as Playmate be SUSPENDED for a period of fourteen (14) days, the suspension to COMMENCE at the opening hour

of business on Monday, July 3, 1989 and to CONTINUE until the closing of business on Sunday, July 16, 1989.

The suspension was stayed pending an appeal to this Tribunal. The appeal was taken from that decision based on the satisfactory record of the two owners and their lack of involvement, on the question of the applicability of a strict liability principle and on the economic hardship which sixteen employees and some twenty entertainers would suffer as a result of the two-week closing.

In fact, an agreement to buy the business had been signed before the police raid and was completed thereafter with an undertaking completed by Pierre Dulude and Jacques Campeau, the new purchasers of the corporate shares, agreeing "to accept the decision of the Tribunal as if they were the licence holders at the time of the allegations outlined in the Notice of Proposal to Revoke the Licence dated January 30, 1989".

Counsel for the new owners sought the discretion of the Tribunal to cancel or lower the fourteen-day suspension on the grounds that the economic hardship would occur for the employees and that the new purchasers were certainly blameless as to the events which occurred.

Counsel for the Liquor Licence Board reminded the Tribunal of the absolute responsibility which the parts of Section 8 place directly on the Licence Holder, and reviewed the Ontario Court of Appeal decision of Regina v. Stevanovich (1983) 43 O.R. (2d) 266.

Counsel for the previous owners explained that the police raid came in consequence of a "sting" operation whereby a truckload of some 422 cases of American liquor had been obtained by the delinquent manager from the Akwesasne Indian Reserve for sale to a police agent for some \$40,000. A search of the licensed premises found a selection of various kinds of similar liquors, perhaps totalling several cases. Both that manager and another were fired immediately. The Regina vs. City of Sault Ste. Marie decision of the full bench of the Supreme Court of Canada was reviewed for the Tribunal, as cited at 85 D.L.R. (3d) 161.

The Tribunal accepts the interpretation of the law as set out in the decision of the Board; as we are dealing here neither with an offence under the Criminal Code of Canada, nor with a

quasi-criminal offence under Provincial legislation. The Liquor Licence Act and Regulations are clear in the points at issue and the responsibility on the Licence Holder is absolute.

Accordingly, pursuant to the powers granted to this Tribunal by Section 14 of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated the June 19, 1989, and orders that all liquor licences for the premises operating as "Playmate" be suspended for a period of fourteen days; the suspension to commence at the ordinary opening of business on Monday, July 9th, 1990 and to continue until the ordinary closing of business on Sunday, July 22, 1990. \*

\*The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.



SEA-HUT FRANCHISE INC.  
(SEA-HUT CORRAL)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO GRANT AN ENTERTAINMENT LOUNGE LICENCE

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
J. BEVERLEY HOWSON, Member  
HENRY KREBS, Member

APPEARANCES:

ARTHUR CROSSMAN, Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

MARY STRETTON, Party

JAMES LE DREW, Party

ROD STEINMAN, Party

DATE OF

HEARING: 23 July 1990

Brussels

REASONS FOR DECISION AND ORDER

The Village of Brussels is a community of some 1,000 persons in the middle of Huron County. With a several block business section of 1880 three storey brick structures, it is a typical Western Ontario farm-based locality serving the variety of needs of its township. The people living on its wide tree-lined streets enjoy a mixture of small community activities geared to a largely older population. Several churches, a bank branch, the Legion and a restaurant or two, as well as an arena and sports field dominate the social life and business affairs of the Village.

In early 1989, Arthur Crossman applied for an Entertainment Lounge Licence as the sole officer and director of Sea-Hut Franchise Inc. to operate a restaurant to be known as Sea Hut Corral in Brussels. Mr. Crossman owns a parcel of land, some two blocks north of the business area of the Village on which a gasoline bar had been operated. The location is on the east side of the main street which is Turnberry Street, in the middle of the block's frontage; with single family homes on both sides and all around the perimeter of the parcel.



Mr. Crossman proposes to build a new restaurant and seeks a licence for 289 persons for a facility where country and western live entertainment will be offered.

After advertising, the Liquor Licence Board held a public meeting on June 13, 1989, where representations from the residents of the village opposed the granting of a licence. The Board concluded that the issuance of the licence sought was not in the public interest having regard to the needs and wishes of the public, and on June 26, 1989 issued a Notice of Proposal to refuse to issue a licence due to the noise which would disturb the residential areas in which the premises would be located, and because three licensed premises already exist to serve the needs of a Village of 1,000 persons.

Mr. Crossman appealed that decision and a full hearing before the Board took place in Kitchener on September 26, 1989. After hearing evidence from James Le Drew, Rod Steinman, Mary Stretton and Sam Sweeney, all opposed, and evidence from the Liquor Licence inspector as to the community, and having then heard from Arthur Crossman as to his plans, the Board found that the onus placed upon objectors in such a circumstance had been met. The Board concluded as follows:

The Board FINDS that the onus placed on the Board and the objectors has been met. The Board FINDS that the granting of this entertainment lounge licence would not be in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located. The application is for a very large liquor establishment to intrude into the middle of a residential area which is strongly opposed to a further licence and adequately served by the existing licensed establishments. The applicant intends to draw on the entire area and surrounding cities. Had the application been a smaller eating establishment to serve the community, the Board's decision might well have been otherwise.

Mr. Crossman appealed that decision on November 8, 1989. Upon publication of the Notice of Hearing before this Tribunal, the matter came before us on July 23, 1990 at the Legion Hall in Brussels.

Brian Johnston is an inspector with the Liquor Licence Board and is familiar with this application. He explained that an Entertainment Lounge Licence was being sought for a proposed 4,000 plus square foot building, which would have a capacity of 289 persons. A full kitchen was planned, and country and western entertainment was to be offered daily except for Sunday. The gas bar near the street would be leased to a third party so that there would be no contravention of the Liquor Licence Board's regulation as to not having a common operation of a gasoline service station and a premises licensed to sell liquor.

The physical location was described as set out above, with some homes being within fifteen feet of the perimeter of the Sea-Hut parcel. Three other licensed locations in the Village with their seating capacity are as follows: Brussels Hotel (312), Golden Lantern Restaurant (82), and Brussels Legion Branch (377). In addition, special occasion permits are available regularly for the arena and for events at the sports field. Live entertainment is permitted at the Brussels Hotel and at the Legion. Mr. Johnston commented that concerns about noise from the premises were to be met by a possible 12 foot high fence on the full perimeter of the parcel, and that parking for 45 vehicles was expected on the site.

Mary Stretton is a sixteen year resident of the Village of Brussels and lived two blocks from the Sea-Hut site until moving to a new house on the outskirts of the Village. She is a councillor for the Village and a member of St. John's Anglican Church. She reviewed the petition sent in to the Brussels Council of some 139 names in opposition to a licence, together with a letter from the Rector and Wardens of her Church, which repeated the opposition to the licence that was first brought out at the hearing of the Liquor Licence Board. She acknowledged that the parcel is zoned C3, which is "Highway Commercial", and which would allow "an eating establishment, drive-in" or "an eating establishment, take-out" or "a hotel or motel", among other service uses. She testified that the Village Council was agreed on opposing the licence and that she was present to confirm their opinion. In her view, the other licensed premises made this location unnecessary especially as it was in a residential area where noise and traffic problems would result.

Rod Steinman brought to the Tribunal the concerns of the Brussels Mennonite Fellowship, a congregation with many members living in the Village. Mr. Steinman is a sales representative with Martin Mills, who has just moved outside of the village. He was also present at the hearing in Kitchener and presented a petition signed by 35 persons of the 125 in the congregation, which noted four concerns as follows:

1. In this residential area the additional noise of people and cars is very disturbing.
2. The gasoline outlets on the same lot as a club selling liquor (sic) is ludicrous;
3. Our church has active groups of youth and younger children who meet frequently on week-days and evenings. The proposed Sea Hut Corral on the same village block, we believe, would adversely influence our youth;
4. In this village of approximately 1000 people is already established three (3) liquor outlets. The fourth is not needed.

In addition, he filed a statement opposing the project signed by him and six other senior members of the Fellowship.

James Le Drew lives at 249 Turnberry Street, just three houses north of the parcel owned by Arthur Crossman. He repeated the concerns he raised at the hearing in Kitchener, stating that the persons in the immediate area all opposed this project and that there are no other business locations within two blocks.

Mrs. Margaret McLeod has lived for nine years just off the block where the premises are proposed. She prefers the area to remain a quiet residential part of the Village and is concerned with noise and traffic that would result. She noted that three of the houses on the perimeter of the parcel have young families with small children who would not want to have a 12 foot wall across their backyards.

Elvin Garland is a primary schoolteacher who has a child in the Brussels school, teaches at another school north of the Village and lives just south of the Village. He is an active Elder in the Brussels Mennonite Fellowship and is involved with many weekday activities for the youth of his congregation. As a teacher and a parent, he is concerned with substance abuse and the influence which such a large project would have on the youth of a small Village.

B. Hugh Hanley is the Clerk-Treasurer of the Village of Brussels. He confirmed the C3 "Highway Commercial" zoning of the property in the midst of the residential area and said that the previous owner had sought such a zoning for the gas bar operation in 1987 when the Village was all rezoned. There had been no objections as the business was likely seen by the neighbours to be a continuation of previous activity and the plans for a small

engine repair business on the property were reasonable. The only other nearby business is a Veterinary Clinic.

He stated that the view of the Huron County Planning Department was that a "dining" function for a premises would be allowed, but questions remained as to a tavern and entertainment activity for the parcel. While the zoning of the parcel would allow Mr. Crossman's project, the Village Council has noted the objections of the residents in the area and passed them on to the Liquor Licence Board. The Council did approve in principle the plans for the premises in a letter of March 17, 1989.

Gerald White is the co-owner of the Brussels Hotel, one of the licensed premises in the Village. He has concerns about Mr. Crossman not being a resident of Brussels, so that any problems would not affect his living in the Village and that a premises of 289 seats would certainly need far more than 45 parking spaces which were to be provided on the property.

Arthur Crossman outlined for the Tribunal his vision of the Sea Hut Corral as a whole new business with a large 6,348 square foot, modern sound proof building for 289 patrons and 40 to 50 employees, surrounded by a 12 foot fence if that was what was wanted. He noted that the zoning was proper for his plan and saw a dine and dance premises with country and western entertainment daily from 11:00 a.m. to 1:00 a.m. the next day, excluding Sunday. He is the sole owner and would live in an apartment in the building. Entertainers would come from across Canada and the United States of America, and he hoped to attract patrons from as far away as Kitchener-Waterloo and London, some 75 kilometres away. He has owned the parcel for two years.

He noted that while 30 persons present at the hearing all opposed the application, he believed many in the Village would really welcome the new project, but he brought no detailed plans, marketing surveys or any supporters with him.

In opposition to Mr. Crossman are the following persons:

Today's citizen witnesses	6
Those on Ms. Stretton's petition	139
Those on Mr. Steinman's petition	35
Those on Mr. Steinman's letter	6
Those on the petition at the hearing in Kitchener	44

Those on Mr. Sweeney's petition at the hearing in Kitchener	119
Those on the letter of the Anglican Church	5
Those who signed in opposition and attended at the Brussels hearing	36
	<hr/>
TOTAL	390
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While, of course, there would be a goodly number of duplications of signatures, the Tribunal must be impressed by the fact that about one-third of the adult residents of Brussels have shown personal opposition to this liquor licence application.

In his argument, counsel for the Liquor Licence Board outlined the reasons why a liquor licence should not be granted as follows:

1. By section 6(1)(g) of the Liquor Licence Act, an applicant for a licence is entitled to be issued the licence except where

- (g) in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

With the opposition of the six citizen witnesses, and the petitions and letters, and the decision of the Liquor Licence Board, the onus on the objectors to prove that they do represent the needs and wishes of the community has been met.

2. For a population of 1,000 persons, the adults in Brussels have three licensed premises of 771 seats, the arena, and other locations for special occasion permits. No further liquor outlets are needed in the community.

3. The proposed location is out of character for such a large establishment to be in the midst of a quiet, single-family residential area. While a gas bar or attendant business would be appropriate for the parcel, this 289 seat facility, with noise and



traffic and off-street parking for many cars needed, is not acceptable to the immediate neighbours; many of whom were at the hearing or signed one of the petitions.

The Tribunal has heard the evidence brought to this hearing and agrees with the findings of the Liquor Licence Board in this matter. In our opinion, the granting of such a licence as Mr. Arthur Crossman seeks for his proposed Sea Hut Corral, is clearly not in the public interest. The needs and wishes of the community are opposed to this project and, accordingly, we uphold the decision of the Liquor Licence Board.

In accordance with Section 14(3) of the Liquor Licence Act, R.S.O. 1980, c.244, the Commercial Registration Appeal Tribunal confirms the decision of the Liquor Licence Board to refuse an entertainment lounge licence for the proposed Sea Hut Corral in the Village of Brussels.

623229 ONTARIO LIMITED  
(ZACK'S EMPORIUM AND EATERY)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCE  
FOR A PERIOD OF TWELVE DAYS

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding  
DAVID APPEL, Vice-Chairman as Member  
NEIL E. VOSBURGH, Member

APPEARANCES:  
RICHARD KESTEN, representing the Licensee  
RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF  
HEARING: 7 September 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by the appellant Zack's Emporium and Eatery from a decision of the Liquor Licence Board of Ontario dated the 28 day of February, 1990, wherein the Board ordered the liquor licence of the Applicant suspended for a period of twelve days from March 19, 1990 following a hearing held on November 14, 1989 at which the Board found that the licence-holder did not take reasonable care to ensure that a person to whom it supplied liquor, namely one Teresa Kennedy, was not under age and further that the incident was aggravated by the fact that she had been served to the point of intoxication and should have been "cut off" whatever her age. The Proposal upon which the hearing was held alleged two grounds therefore:

- (a) the past conduct of its officers or directors or a shareholder who owns or controls 10% or more of its issued and outstanding equity shares as determined under section 19 of the Liquor Licence Act affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (b) the licence-holder is in breach of a term and condition of its licence.



The particulars of the second ground indicate two factual bases for these allegations, the first being that certain persons under the age of 19 years were sold liquor on the premises and alleging breaches of Section 44(1) of the Liquor Licence Act and of subsections (5) and (6) of Section 8 of Revised Regulation 581/80 under the Act, and the second being that one of these persons had approximately 15 alcoholic drinks and was intoxicated. This Statement of Particulars did not contain a reference to a section or a Regulation as did the first one.

At the hearing before this Tribunal, counsel for the Board specifically acknowledged that the Board was not relying upon the allegation in clause (a) and further that he was not asking for any finding against the licence-holder on the ground that it had acted in breach of Section 43 of the Act forbidding the selling or supplying of liquor or permitting the same to be sold or supplied to a person in or apparently in an intoxicated condition. The Tribunal was left with the issue as to whether or not the conduct of the licence-holder, by way of acts or omissions constituted a breach of term or condition of the licence by reason of being a breach of Section 44 or of the Regulations aforementioned.

The salient facts are simple and tragic. Zack's Emporium and Eatery at 1625 Military Trail in Scarborough held a Dining Lounge Licence with a capacity of 475 persons. It catered substantially to a college crowd in the 19 to 23 year age group and was very much an "in place" which was filled largely to capacity at its busiest times, one of which was on Friday nights.

On Friday night, September 2, 1988, three girls who were friends, Toni L. Howes, born July 10, 1970, Michelle Alic, born December 7, 1970 and Teresa Kennedy, whose eighteenth birthday would have been September 4, 1988 went to Zack's to celebrate Teresa Kennedy's birthday. It was established that Toni Howes, who was driving had only a few drinks, Michelle Alic had 5, and Teresa Kennedy quite a large number - apparently 10 to 12, or perhaps even more and became quite drunk.

On the way home driving along Highway 401 east from Toronto, Teresa Kennedy was causing trouble for the driver Toni Howes and the latter pulled the car off on to the shoulder of the road and stopped. Teresa Kennedy got out of the car and proceeded on foot to cross the road in the path of oncoming traffic, was struck by a transport truck and killed instantly.

On behalf of the Board, there was presented to the Tribunal the evidence of Michelle Alic called as a witness, the evidence of Toni Howes in the form of the transcript of her evidence at the previous hearing and the evidence of Constable

Smith, a Metro Toronto Police Officer, with the special detachment in charge of checking liquor licensed premises.

Michelle Alic said that the three girls arrived at Zack's about 9:00 p.m. None of them were questioned as to age or asked for any identification. She saw about four doormen (whom she called bouncers) at the door and others inside. The three girls were seated at a table and ordered alcoholic drinks. She and Toni Howes spent their time at their table and dancing with "two guys", but Teresa Kennedy went up to the bar where others were buying her drinks. Michelle Alic's evidence as to the number of drinks for each was a few for Toni Howes, 5 for herself and 10 or 12 for Teresa Kennedy.

This last number was corroborated by evidence of Toni Howes who said that Teresa Kennedy had four or five drinks while at the table and continued drinking at the bar and was "pretty drunk". It was also corroborated by a Report of The Centre of Forensic Sciences at page 24 in tab 5 of Exhibit 3 which indicated a blood alcohol count of 237 mg/100 ml and a urine count of 227 mg/100 ml. A test for drugs showed no trace of such.

Michelle Alic further testified that the other two wanted to start home somewhere between 11:00 p.m. and midnight, but were not able to get Teresa Kennedy away from the bar until 12:30 a.m. All of the evidence establishes clearly that, by that time, she was quite drunk and her conduct was such that this would have been readily apparent to anyone paying attention to her. The conduct of Teresa Kennedy after her friends got her away from the bar and finally into the car and on the way home fully corroborates this conclusion, but what happened after they left Zack's premises, while tragic in the extreme, is not otherwise relevant to the issues which the Tribunal must determine.

Very important, however, is the evidence before us bearing upon the question as to the apparent age of the three girls that night to the eye of a reasonable person looking at them. Both Michelle Alic and Toni Howes said that all three were dressed and made-up to look older than 19. Both had previous experience in seeking entry to licensed premises and most times they had got in, but sometimes they had been challenged. Prior to arriving there, both Toni Howes and Teresa Kennedy told Michelle Alic, who had not been there before, that they had been there before and that all of them would get in that night.

During the argument, a point was made of the fact that up until 9:00 p.m., it was the practice to allow persons under 19 to enter with their family for dinner. This is specifically spelled out in the second paragraph at page 27 of Exhibit 3, being

written instructions provided by Zack's to its doorpersons. I refer to this because it is not clear on the evidence whether these girls arrived a little before or a little after 9:00 p.m. In the view of the Tribunal, there is no issue of consequence here. The girls were not accompanied by any family and, in any event, went into the bar area and to the bar so that, even if the duties imposed by the Act and the Regulations did not arise at the time the doormen were scrutinizing them upon entry, these same duties did arise subsequently on the part of the doormen patrolling inside and that of the other staff involved with serving and dealing with them, and the test at that time is the same.

Further evidence on the issue was that the whole place was not brightly lit and it would not be too easy to see that these girls, dressed and made-up as they were, appeared younger than the 19 to 25 crowd which mostly filled the place. Michelle Alic said that Teresa Kennedy was taller than the other two and generally looked older than they did.

On the other hand, we had the evidence of Constable Smith who said that when he interviewed Michelle Alic and Toni Howes a few weeks after the incident, they did not look 19 years old to him. He saw a picture of Teresa Kennedy and he said that she did look 19. In considering this evidence, it must be remembered that both were seen by him in quite different circumstances as to dress, make-up and light, and in their own homes in the presence of their parents and probably frightened about giving and signing formal statements.

While the two girls were able to identify one of the staff, a waitress Bonnie Raines who served them, and she gave evidence before us, neither she nor anyone else at the establishment had any recollection of seeing any of the three girls on the night in question and could give no evidence on this critical issue.

The defence put forward is set out in the second paragraph of a letter dated July 5, 1990 under a heading, "CONCISE STATEMENT OF GROUNDS", which letter is Exhibit 4 and the grounds are stated as follows:

The Liquor Licence Board ignored the evidence presented by the licence-holder with respect to the steps taken to ensure that under aged drinkers were not served. In addition, the Liquor Licence Board ignored the evidence of the appearance of the three young persons at the time of the

incident. If this evidence was properly considered there should have been a conclusion that

- (a) the establishment took every reasonable step to ensure that persons apparently under the age of 19 were not served and
- (b) that the young persons served were not apparently under the age of 19.

In support of this defence, the Tribunal was given the evidence of James Sokloridis, a co-owner and manager of Zack's, of Bonnie Raines aforementioned now a bartender at Zack's and of Constable Delaney, also of the special unit of Metro Toronto Police aforementioned. Mr. Sokloridis described at length all of the precautions taken at Zack's to prevent persons under 19 gaining entrance improperly and being served liquor and he identified three manuals which he said were provided to all doorpersons, bartenders and servers; copies of which are found from pages 25 to 40 of Exhibit 3.

All of these stress the importance of all customers for liquor being 19 years of age and specifically instruct that anyone who does not look 25 should be required to produce identification and further instruct that such identification must be either an Age of Majority card or an Ontario driver's licence with a photograph of the person in question.

Mr. Sokloridis said that on a Friday night, there would always be two managers on duty, one inside the door and one floating about the premises; six doormen, two at the front door, two back 10 or 12 feet on the way in, and two floating about; four bartenders at four different bars; and eight to ten waiters and waitresses; all keeping an eye on what was going on and all with the aforementioned instructions with regard to apparent age of customers and the requesting of satisfactory identification.

The establishment's precautions in this regard also included regular meetings with staff to educate and instruct them and make sure they kept up proper vigilance, and these meetings included calling in members of the special police unit at regular intervals to reinforce the instructions and add special advice and hints as to things for which they should watch as indicated by the experience of the police.



While the Tribunal appreciates that all of this evidence could well be exaggerated for self-serving purposes, it is the Tribunal's view that in this case, it was accurate and should be accepted. We were favourably impressed with the manner in which Mr. Sokloridis gave his evidence and, indeed, at this point, I should say that it appeared to the Tribunal that all of the witnesses for both parties gave their evidence honestly and accurately in accordance with their best observation and recollection and, while we did not have the opportunity to see Toni Howes in the witness box, a reading of the transcript of her evidence at the previous hearing indicated that she did the same on that occasion.

This evidence of the effort made by the licence-holder to comply with the law was corroborated in quite a strong manner by the evidence of both constables who were called, Delaney and Smith. Both gave Zack's a high rating for its measures taken to ensure compliance with the law.

P.C. Delaney said that he had been there over one hundred times and never saw anything to indicate that Zack's management was not carrying on with honesty and integrity. He said they were always helpful in dealing with any problem or matter which the police took up with them, and on their initiative, asked the police to come and talk to their staff. P.C. Delaney said that they did try to keep things right and that while sometimes the police saw problems, they never saw anything to justify charges.

The fact that these officers, who appeared very able and experienced, were prepared to go so far in their evidence impressed the Tribunal quite strongly.

Some additional corroboration of the evidence put forward by Mr. Sokloridis and by Ms. Raines can be found in the fact that this very busy "in" spot bar had been in operation for five years with many hundreds of people, mostly between ages 19 and 25 on the premises almost every open night and never, apart from this most unfortunate incident, did anything happen to give rise to a criminal charge or disciplinary action by the Board.

Upon all of this evidence, the Tribunal has no difficulty in agreeing with both counsel that there are no grounds for belief that this licence-holder's business was not carried on or will not be carried on with honesty and integrity.

This brings us to the issue which we do have to decide. It is clearly proved, and indeed conceded, that these three girls did gain access to the premises on the night in question, that

they were served liquor therein, and that all three of them were under nineteen years of age. The question is whether, in all of these circumstances what happened constituted a breach of Section 44(2) of the Act or of subsection (6) of Section 8 of Regulation 581/80?

The Tribunal approached this issue by concluding first that what happened resulted either from the fact that when the girls presented themselves at the door and later throughout the evening when they were being served and were consuming liquor, the officers and servants of the licence-holder did not take the proper and required steps to observe them and assess, as reasonable people, whether or not they appeared to be over or under the age of 19 years or from the fact that the officers and servants of the licence-holder did take these proper and required steps and reasonably came to the conclusion that these girls appeared to be over the age of 19. If the first explanation is the correct one, the Order of the Liquor Licence Board from which this appeal is taken should be upheld. But if the second explanation is correct, then the appeal should be allowed.

This issue comes down to a question of fact to be determined - on all the evidence before us which of the two is the more probable explanation. While either, of course, is possible, it is the Tribunal's view that the second explanation is the more probable. To find otherwise would be to find either that the system described was not sufficient or that it was not followed on this occasion. There is no evidence of this latter, except the fact that these girls got past it. These girls had made themselves up as best they could to deceive the observers and it appears more probable, that they succeeded in doing this on this occasion as the evidence indicated they had also done on quite a number of previous occasions at this and other establishments. In her evidence, Toni Howes indicated that she had been to Zack's a dozen times.

The only authority cited to us was the case of Regina vs. Boardman 47 C.C.C. (2d) 334, which was also the only case to which reference was made in the Reasons for the Decision of the Liquor Licence Board which reference is found in the third last paragraph of that decision on page 11 of Exhibit 3.

The Tribunal agrees with the submission that the facts of this case bring it within category number two of the three listed at the bottom of page 338 of the Boardman decision. Since we have concluded that the more probable explanation is that the officers and servants of the licence-holder did take reasonable care in making observations and concluded therefrom that these girls were apparently of the age of 19 then, in fact, they had a

reasonable belief in a mistaken set of facts which, if true, would have rendered their actions not a breach of the Act and Regulations.

The Tribunal gave consideration at some length to the reasoning of the Board in the third to last paragraph of its decision noted above and, with respect, was not able to agree with it. The evidence cited by it is only some of that to be taken into account when determining upon all of the evidence before us, what is the essential question of fact upon which this case turns - which of two possible explanations is the more probable one?

The most troubling piece of evidence noted in this paragraph by the Board was to the effect that Teresa Kennedy was served to the point of intoxication and should have been "cut off". However, as I noted near the beginning, counsel for the Board stated that he was not proceeding against the licence-holder on the ground that it had acted in breach of Section 43 of the Act and the whole hearing proceeded to deal with the issue concerning the age of the girls.

This left the evidence of drunkenness on the part of Teresa Kennedy as evidence from which some inference could be drawn as to the extent of the surveillance and observation of the girls for the other purpose of their age and we took this into account as a relevant consideration along with all other relevant evidence and inferences in determining the essential question of fact. The Tribunal wishes to state that the relevant considerations do not include, on the one hand the tragic consequences to Teresa Kennedy or, on the other the very serious effect of the penalty imposed by the Board upon the licence-holder provided the alleged breach of the Act and Regulations were found to be established.

The Tribunal, therefore, concludes that, on a balance of probabilities, at the relevant times, these girls were not persons "apparently under the age of nineteen years" within the meaning of the Act and the Regulations and that this appeal should, therefore, be allowed.

Accordingly, pursuant to the powers granted to this Tribunal by Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the decision of the Liquor Licence Board dated February 28, 1990.



WEVA HOLDINGS INC.  
(CANADA TAVERN)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCE FOR A PERIOD OF SEVEN DAYS

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
DR. STEPHEN G. TRIANTIS, Member  
ROBERT COWAN, Member

COUNSEL: DEREK R. FREEMAN, representing the Applicant  
and T. WHITBY as Assistant Counsel

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF HEARING: 31 January 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an application by way of appeal from the decision of the Liquor Licence Board of Ontario (the "Board") issued August 31st, 1989, imposing a seven day suspension for serving two patrons who were in an intoxicated condition at the time of serving. The original Proposal had been for a fourteen day suspension.

The hearing before the Board took place on June 27th, 1989. The two police officers who gave evidence to the Board also appeared before this Tribunal. The Tribunal was informed that the only other oral evidence given before the Board was that of Mr. Matiya, one of the owners of the Tavern but who was not present in the Tavern on the night in question. The Board had before it, therefore, only the evidence of the police officers as to drunkenness of the patrons which could not be contradicted by Mr. Matiya. In addition, the Board had the evidence of convictions of the two patrons together with a plea of guilty by the waiter who served them and who paid a \$100.00 fine. It is, therefore, quite understandable why the Board would have made the decision which is now under appeal.

The Tribunal, however, had considerably more evidence placed before it, together with an explanation of the guilty pleas. In the case of the two patrons, counsel for the Board pointed out that the charges are virtually like a "parking ticket" in that one so charged can tick off a response: "guilty", "guilty with an

explanation" or "not guilty". In the absence of a response, a guilty verdict is entered.

Apparently this was the case in this instance. With respect to the plea of guilty by the waiter, the Tribunal had the benefit of hearing his evidence and his explanation that such was entered on the basis of a plea bargain so that the charge would be withdrawn against the licence holder, even though the waiter believed that he had not been guilty of the offence.

The Board in its decision noted as follows:

This is the Licensee's first appearance before the Board. The Licensee has apparently been most cooperative with both the Board's staff and the police department and there has been no problem with the establishment since October of last year. Counsel for the Licensee submitted that this establishment is located in a very rough part of the city and that a suspension was not in order in all these circumstances.

Although the Board appreciates and acknowledges both the Licensee's cooperation and the difficulties (sic) location of the premises, it is the Board's view that a suspension is required, particularly in light of the evidence that the Manager had been warned on several occasions regarding serving patrons to the point of intoxication and further that the Night Manager was warned by the police on October 20, 1988 (two days prior to the occurrence with which the hearing dealt).

Had the Board had the evidence before it which the Tribunal has been privileged to have, it is entirely possible the Board might not have issued the decision which it did. For one thing, the Board made much of the fact that there had been prior warnings which on the evidence before the Tribunal has to be questioned.

The evidence of serving patrons who were intoxicated was given by Constable Miller, who sat in the room at the tavern from 11:30 p.m. until the arrests took place at approximately 12:45 a.m. on October 23rd, 1988. During that time, the one patron was served two bottles of beer and in the opinion of Constable Miller, the patron was too intoxicated to respond to the waiter's "last call" at 12:15 a.m. The other patron came into the tavern later and asked for three draft beers and apparently another three or four, some of which were left on the table when this patron was arrested. The observation of Sergeant Cannon (who was the arresting constable), only occurred at the time of the arrest at which time the two patrons were handcuffed. His notes indicated that the waiter denied that the two patrons were intoxicated.

Both constables indicated that the tavern, located at Queen and Sherbourne is in a very rough neighbourhood where drugs and drunkenness are a problem. They also indicated that this tavern is a notch above the others in the neighbourhood, that it has co-operated with the police and that there have never been any prior liquor violations by the Licensee, nor in fact have there been any since the date in question.

Called for the licence holder was Harold Lounds, an inspector with the Liquor Licence Board, who was in charge of the area where the tavern is located in 1988. He indicated that Matiya is a reasonable operator, that he pays attention to the business, and has good supervision. He stated that the waiters have been there for some time and know their patrons. He also testified that a senior police officer had indicated to him that he did not want the tavern charged because the tavern owners were co-operating with the police department in a homicide investigation, but that the police department would not put such request in writing and, therefore, this evidence was not presented to the Board at its hearing in June 1989.

The waiter E. Liamakeros testified that he had worked in the tavern since 1972. He also stated that he had known one of the patrons for seventeen years and the other patron had been served by him on at least twelve other occasions. He testified that neither of these patrons was intoxicated when he served them. He also indicated to the Tribunal that he does not hesitate to cut off patrons if they have had too much to drink and will send them home.

Terrance Noade, who was the Night Manager on the evening in question, has been employed at the tavern for twenty years. He testified that the two patrons were not intoxicated. He, in fact,

had talked to one of them when the patron was buying cigarettes during the period in question.

Constable Miller was an honest witness who believed that the patrons were intoxicated, although he acknowledged that a waiter who knows the patrons may be a better judge of such matters. On the basis of this conflicting evidence and the explanations given in regard to the convictions, the Tribunal in weighing this evidence cannot find there is a preponderance of evidence supporting the finding of serving alcoholic beverages to intoxicated persons in the circumstances before this Tribunal.

In making this finding, the Tribunal does not in any way wish to indicate that it finds fault with the evidence given by the two police officers. The Tribunal was impressed with their evident conscientiousness and attempts to be fair to the licence holder. Their task in policing the problems in this neighbourhood is not to be minimized. The co-operation of the tavern ownership and management with the police is also to be commended and encouraged. What appears to have occurred on the date under consideration is in the view of this Tribunal, an honest difference of opinion which should not in these circumstances and in dealing with this particular Licensee result in the suspension decided upon by the Board.

Because the Board also was of the opinion that this matter was aggravated by reason of prior warnings, the Tribunal considered the evidence in that regard.

Sergeant Cannon indicated that he had warned the tavern management on three occasions. One was the previous evening in respect to a drug problem in the washroom. One was a few months earlier when a patron collapsed and one was when he thought a patron was intoxicated.

Mr. J. Bagorro, the General Manager of the tavern, indicated that he was the person warned on the two occasions regarding drinking. On the one occasion, Constable Cannon pointed out an intoxicated person. Mr. Bagorro disagreed and testified that Constable Cannon did not ask Bagorro to evict the patron. On the other occasion, Mr. Bagorro stated that the patron came in wearing a hospital arm band and that he would not serve him. The patron asked if he could sit down and rest which Bagorro permitted. He fainted and Bagorro called an ambulance. Constable Cannon apparently at that time accused Bagorro of serving "drunks" which Bagorro denied indicating they knew the patron was a sick man and he had not been served.

Therefore, the Tribunal has come to the conclusion on the basis of the evidence placed before it by employees of long standing, by the owner Mr. Matiya and by Mr. Lounds, the Liquor Board Inspector, that in this rough area, the Canada Tavern operations are reasonably well conducted and that on the balance of the evidence, it has not been shown to this Tribunal that the terms of its licence have been violated.

By virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal revokes the decision of the Liquor Licence Board of Ontario dated the 31st day of August, 1989, and directs the licence of the Applicant not be suspended.

EDWARD R. DIRSE

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES  
OF THE MOTOR VEHICLE DEALERS' COMPENSATION FUND  
FOR REFUND OF MONIES

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
J. BEVERLEY HOWSON, Member  
ROSS WEMP, Member

APPEARANCES:  
EDWARD R. DIRSE, appearing on his own behalf  
LARRY D. BANAK, representing the Board of Trustees  
of the Motor Vehicle Dealers' Compensation Fund

DATE OF  
HEARING: 22 March 1990 Kitchener

REASONS FOR DECISION AND ORDER

The Tribunal has considered the claim which you have brought before us and we believe that with some regret, we will have to reject it.

We note that under the Compensation Fund application form, the matter under item 5 is with respect to the return of a deposit on an undelivered motor vehicle. I accept your comments, that in your telephone discussions with Mr. Daniel Berze, formerly the administrator at the Motor Vehicle Compensation Fund office, there may well have been left with you the impression that this was the particular item that you should use. However, in our view, that is simply not correct and we have no ability to give jurisdiction under the Fund where that jurisdiction, in fact, does not occur.

There are two other matters though that you can do in order to advance a claim.

The first, of course, is to go under Item 1 on the claim form which deals with the final judgment against a motor vehicle dealer which has remained unpaid for 90 days. It is possible for you, as we understand it, to go the Small Claims Court in the Ajax area where the maximum may be \$3,000 with costs in order to advance a claim against Sandown Motors and Mr. Muurinen. The completion of obtaining judgment under that claim would then allow you to proceed.



As well, you could proceed in the District Court where you live in your county to obtain a default judgment. Then the value of that judgment, together with the claim for the costs that you were put to that are taxed, that is that are allowed by the court, could also be used as the basis for your claim. I would hope that you would receive legal advice as to what, in fact, the costs of maintaining such an action would be where you are likely to receive a default judgment. I believe that they would be substantially less than what you have been told earlier on.

In the alternative, if you look at Item 4, a transaction with a dealer who has been convicted under the Criminal Code of Canada of fraud, theft or false pretence is also a way under which you can advance your claim.

This Tribunal has no knowledge as to when Constable Robert McKinney will be able to proceed, if at all with charges, or whether or not they would be successful in obtaining a conviction, but that certainly gives you another choice.

The Tribunal will suggest that if there is uncertainty as to those criminal charges, you do proceed to obtain a default judgment. From the information we have before us, you would be able to advance a claim and certainly the dismissal of your claim under this item 5 would not compromise you in any way.

While we have sympathy for you in the situation because of the difficulty to which you have been put, we regret that we do not have the jurisdiction to grant you the funds under item 5 because, in fact, you did receive the vehicle.

By virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Board of Trustees to disallow the claim.



BORIS GALPERIN

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
J.T. HOGAN, Member

APPEARANCES;

ROBERT D. SLOAN, representing the Applicant

ALVIN TORBIN, representing the Registrar under the  
Motor Vehicle Dealers Act

DATE OF  
HEARING:

17 May 1990

Toronto

REASONS FOR DECISION AND ORDER

This is a Proposal by the Registrar not to register Boris Galperin as a salesman under the Motor Vehicle Dealers Act for the following reasons set out in the Registrar's Proposal:

1. Galperin has been convicted of the very serious offence of conspiracy to commit fraud (odometer tampering) in the very industry in which he seeks to be registered.
2. Further, Galperin has been convicted under the Motor Vehicle Dealers Act of Ontario of carrying on as a salesman under the said Act while not registered under the said Act.

From these facts, the Registrar concluded that the Applicant's past conduct provides reasonable grounds for belief that he will not carry on business in the future in accordance with law and with integrity and honesty.

The Registrar indicated to the Tribunal that his concerns came from the number of charges which were issued with respect to the odometer tampering which was a charge of conspiracy to commit fraud, even though there was only one conviction. In addition, however, there was an order for restitution in the amount of \$15,000 paid out to more than 70 persons. For this

reason, the Registrar was of the opinion, that the Applicant's past conduct was sufficient to deny registration.

Furthermore, the Registrar was concerned that the application for registration while dated June 5, 1989, was not filed with the Registrar until July 12, 1989, during which time the Applicant had been convicted under the Motor Vehicle Dealers Act on June 22, 1989, of carrying on as a salesman while not being registered under the Motor Vehicle Dealers Act.

The Applicant in his evidence made much of the fact that he had actually signed the application on June 5, although he admitted that he had carried it around with him for some time before mailing it and, in fact, probably did not mail it until early in July 1989 after the date of his conviction under the Motor Vehicle Dealers Act.

The Tribunal considers that the Registrar acted quite properly in determining that this failure to disclose was material and goes to the whole question of Galperin's carrying on a business in accordance with law and with integrity and honesty.

The Tribunal considers that Galperin had an obligation to disclose this information before filing the application.

With respect to his conviction, Galperin in his testimony before the Tribunal indicated that the company A la Mode Vehicle Sales consisted of only two people, that he was the controller, buyer and salesman, and that he was conducting the business in all aspects except for the signing of cheques.

In the view of the Tribunal, this clearly further indicates a disregard by Galperin for the law and it casts doubt upon his integrity and honesty.

Counsel for Galperin objected to the particulars contained in the Notice of Further Or Other Particulars which dealt with infractions under the Highway Traffic Act and the Criminal Code with respect to driving offenses over the past fourteen years. Counsel for Galperin pointed out that the Registrar was in a preferred position in the sense that he could obtain particulars as far back as fourteen years, whereas an ordinary individual in requesting information would only obtain particulars for a three year period. It further appeared, counsel for Galperin also pointed out, that many of the charges in the early years occurred at a time when Galperin was under twenty years of age. The Registrar indicated that it was not so much the charges in themselves, but the cumulative effect tied in with the

other matters upon which he relied in his original Notice of Proposal.

The Tribunal gives little weight to those charges which occurred a number of years ago, particularly observing the witness Galperin and his testimony with respect to his having matured. Nevertheless, it is of the view that the serious charge of having excessive blood alcohol in 1987, only two years before his application, was something which should have been disclosed and the fact that there were several suspensions with respect to non-payment of fine in 1987 and 1988 give concern to the Tribunal with respect to Mr. Galperin's past conduct concerning his expressed intention to behave responsibly as a motor vehicle salesman in the future.

Objection was raised to the admission of the Notice of Further Particulars. The Registrar indicated to the Tribunal that this arose simply because additional facts came to light subsequent to the issuance of his original Proposal. This Tribunal considers the filing of Further Particulars to be quite proper under the circumstances, particularly inasmuch as full particulars have been given to the Applicant and given the fact that the hearing before this Tribunal is a hearing de novo.

On the basis of the evidence, therefore, placed before the Tribunal, including that of Galperin himself and following the test established by the Divisional Court in *Re Brenner* and the responsibility for the Registrar to consider the public interest, this Tribunal cannot find that the Registrar has acted in any way improperly in reviewing the past conduct of the Applicant Galperin and finding it wanting.

By virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal, therefore, directs the Registrar to carry out his Proposal.

GRAND STYLE INVESTMENTS INC.  
(GRAND STYLE AUTO)  
and RONALD D. HEATH

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN

TO REFUSE TO GRANT THE REGISTRATIONS

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
JOHN LOGAN, Member

APPEARANCES:

RONALD D. HEATH, representing the Applicant

D. BOURGEOIS, representing the  
Registrar of Motor Vehicle Dealers & Salesmen

DATE OF

HEARING: 30 January 1990

Toronto

REASONS FOR DECISION AND ORDER

The Applicants, Grand Style Investments Inc. ("Grand") and Ronald D. Heath have applied to the Tribunal for a hearing pursuant to Section 7(2) of the Motor Vehicle Dealers Act (the "Act"). The Registrar of the Act has proposed to refuse registration to Grand as a motor vehicle dealer and to Mr. Heath as a motor vehicle salesman. Neither Applicant has any record of a previous registration under the Act. Mr. Heath is the controlling officer and director of Grand.

The Registrar's Proposal to refuse registration to the Applicants is based upon the Registrar's opinion that the past conduct of Mr. Heath affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. Pursuant to Section 5 of the Act, they would not, therefore, be entitled to registration.

Mr. Heath has a very lengthy criminal record, spanning over a period of close to twenty years. His most recent conviction was on March 24th, 1988, on the charge of assaulting a police officer. His criminal record discloses some twenty-five convictions on charges which include: theft, shop breaking with intent, receiving stolen property, assault causing bodily harm, possession of a narcotic, breach of probation, causing a disturbance (six counts), theft under \$1,000, assault, mischief, assault with intent to resist arrest, and numerous convictions for

indecent exposure. In his evidence, Mr. Heath went through each conviction on his record sheet in an attempt to explain the circumstances behind each incident to the Tribunal. While the Tribunal is prepared to take Mr. Heath's explanations into consideration to some extent, the Tribunal is not equipped or in a position to, in effect, retry these twenty odd charges or to exonerate Mr. Heath from charges of which he has been duly convicted.

In the final analysis, the criminal record must be accepted as evidence that Mr. Heath has in the past been guilty of criminal conduct on some twenty-five occasions and spanning a period approaching twenty years. The fact remains that as at the date of the hearing, Mr. Heath's criminal record was not part of his distant past since the most recent conviction occurred less than two years ago. Furthermore, we were advised that Mr. Heath was on probation until just a few days prior to the hearing.

The Tribunal also heard evidence at length about Mr. Heath's propensity towards indecent exposure. We have no doubt that Mr. Heath has made every effort to seek the help of professionals in order to get his compulsion under control. Since 1980 he has been, and continues to be, under the care of a psychiatrist and the Tribunal had an opportunity to read a number of medical opinions authored by that doctor. Those psychiatric reports gave the Tribunal some insight into the possible reasons for Mr. Heath's behaviour. Mr. Heath is now on medication that appears to be helping him to keep the compulsion under control. However, as is clear from Mr. Heath's own evidence, there is no guarantee that he will not repeat the offensive, and illegal, behaviour. Mr. Heath freely admitted to the Tribunal that the occasions in respect of which he was convicted of indecent exposure are "not all that's happened".

Despite all of his difficulties Mr. Heath has managed, to his credit, to maintain what appears to be an excellent work record. He was also a partner in a snow-removal business and was a registered real estate salesman from February 1984 to April 1985. (He voluntarily terminated his registration as a real estate salesman.) He has also managed to build up a substantial net worth. He appears to have a solid marriage and it was very clear that his wife is extremely supportive and committed to him.

Mr. Heath has made it clear to the Registrar and to this Tribunal that he is not interested in being a salesman working for another motor vehicle dealer. He is not, as he put it "looking for a job". He is only interested in pursuing his own dealership, and, furthermore, without partners.



While he has no prior direct experience in the industry, he is confident that he can succeed. He also stresses that his brother is a registered dealer in Thunder Bay and submits that he can always turn to his brother for help and advice. However, it is clear that telephone contact with his brother does not equate to the supervision and control that the Registrar would consider appropriate and necessary in this case, as a condition of registration as a salesman.

The Tribunal is not without sympathy for Mr. Heath and recognizes that he is making progress in controlling his condition. However, at this point in time, it is far from certain that Mr. Heath will not relapse into his problem behaviour or that he will not again engage in illegal acts. Not enough time has passed without incident to satisfy the Tribunal that all of Mr. Heath's problems are in the past. While the Tribunal might have considered Mr. Heath's personal registration as a salesman on the condition that he work under the supervision of another dealer, it is clear that Mr. Heath is not interested in being registered under such conditions.

As this Tribunal has indicated many times, its function, and that of the Registrar, is to protect members of the public. The Tribunal does not lightly deprive an individual of registration. But the Tribunal is not prepared to take a chance on an Applicant where there is a potential risk to members of the public who will have dealings with him. That risk is palpable here where the Applicant's record of past conduct clearly affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse to grant the registrations.



JOSEF REZNICEK

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
JOSEPH GRAHAM, Member

APPEARANCES;  
JANE WEARY, representing the Registrar under the  
Motor Vehicle Dealers Act

No one appearing for the Applicant

DATE OF  
HEARING: 21 June 1990  
Ottawa

REASONS FOR DECISION AND ORDER

Having consulted and having heard the evidence, the Tribunal is of the view that the Registrar's Proposal should be approved. It is very clear from the evidence submitted to this Tribunal that the application failed to disclose the existence of the prior Judgments, and this in itself, is evidence of a lack of honesty and integrity.

The question of financial responsibility has also been raised and the fact of the outstanding Judgments is further clear evidence to this Tribunal, that this Applicant is not someone who is fit to be registered under an Act which requires the public to be protected and the Registrar to assume that responsibility.

For that reason and the fact that the Applicant having asked for this hearing, has failed to attend after due notice has been given, of which we are fully satisfied that proper notice has been given at least to the address at which he has indicated notice should be sent. Under those circumstances, therefore, it is appropriate that we make this decision, and by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

The above decision and reasons therefor were orally given at the conclusion of the hearing by the Vice-Chairman in the presence of the other members who concurred.

JAMES STOGDILL

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN  
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
GORDON R. DRYDEN, Member  
J.T. HOGAN, Member

APPEARANCES:  
SIMON VAN DUFFELEN, representing the Applicant  
JANE WEARY, representing the  
Registrar of Motor Vehicle Dealers & Salesmen

DATE OF  
HEARING: 7 December 1989 Toronto

#### MAJORITY DECISION

The following is the decision of the Chairman and J. T. Hogan, Member.

This application by James Stogdill is in respect to a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registration of Stogdill which registration was renewed January 6, 1989. The basis for the Registrar's decision is set out in his Notice of Proposal in which the Registrar relies on the answer "No" given in response to question 6 dealing with convictions or charges pending in the Application for Renewal. In fact, a search of the Applicant's records at the Ministry of Transport reveals 23 driver related convictions between February 22, 1979 and May 9, 1989. In addition, on March 9, 1989, the Registrant pleaded guilty to 10 counts of committing an unfair business practice under Section 3 of the Business Practices Act arising out of sales of motor vehicles obtained on consignment by the Applicant's employer, Huron Park Nissan Ltd.

With respect to the driving charges, the Applicant in his testimony before the Tribunal was forthright and accepted full responsibility for not having responded. He indicated that he was not aware that driving offenses convictions had to be reported. In fact, if one carefully reads Section 6 of the Application for Renewal one will observe the following:

NOTE: Where the Applicant has been previously registered, list only those convictions which have occurred since the date of last filing.

If this policy had been observed by the Applicant, he would only have had to report 6 driving offenses between the period January 1, 1987 and December 31, 1988; 2 for using plates not authorized for the vehicle and 4 speeding offenses, ranging from 15 to 23 kilometres over the limit. While the Tribunal does not minimize the fact that these are convictions, they do not of themselves indicate that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

The matter of charges pending under the Business Practices Act is of much more serious concern to the Tribunal, however, and the failure to disclose that such charges were pending in answer to question 6 requires further consideration. It has been argued before the Tribunal on a number of occasions that the question of pending charges offends the provisions of Section 11(d) of the Charter of Rights in that a citizen is entitled "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial Tribunal." This may, therefore, be a reason for not so responding to this question although it has also been suggested that because of the regulatory function of the Registrar that this information is a reasonable use and restriction on the rights conferred under Section 11(d).

There being some doubt, therefore, as to the propriety of this request, the Tribunal is not prepared to fault the applicant with regard to his answer on his January, 1989 application, although the Tribunal would expect a future application to reveal convictions subsequent to January 1, 1989.

Nevertheless, the question of convictions on 10 charges under the Business Practices Act are of relevance in the review by the Registrar of the past conduct of the Applicant. These convictions were registered on March 9, 1989 and were, therefore, appropriately considered by the Registrar in his Notice of Proposal dated August 25, 1989. They arose out of consignment sales by the applicant and his employer, Huron Park Nissan Ltd. The evidence disclosed that the Applicant has been continuously employed by his current employer or its predecessor (the principals of which, however, are the same) since December 1973 when he left high school. All his business experience and business education, therefore, has been with this employer. His past conduct has not been previously in question. His problems seem to have arisen only since his company became involved in consignment sales approximately four years ago.

In his evidence, Stogdill stated that he has never been an officer, director, or shareholder of the company. He has always been a salesman although he was promoted to manager in 1980. He informed the Tribunal that no instructions were given as to how consignment sales were to be handled and that emphasis was placed by his employer on the minimum profit to be obtained on each transaction.

On the evidence presented to the Tribunal, there appears to have been less than frank disclosure to consignors as to the negotiations for sale of their vehicles and ultimately as to the sale price realized. Stogdill acknowledged that he was wrong in not making full disclosure to the vendors. He appears to have been of the view that his only obligation was to pay to the consignor whatever price was agreed upon originally or subsequently negotiated - some of these negotiations apparently occurring very close to the time of consummating a sale to a purchaser. Whether this occurred on occasion even after a sale price had been agreed upon was not clear in the evidence before the Tribunal. But in any event, Stogdill admits that these practices were not right and after the charges were laid in August 1988 the company policy and his has been to make full disclosure of negotiations with respect to consignment selling.

With respect to the charges under the Business Practices Act Stogdill stated that he pleaded guilty because he was wrong and there was no point in prolonging the matter. It should be noted that by agreement he pleaded guilty to 10 charges and was fined \$250 on each and that his employer pleaded guilty to 5 charges and was fined \$1,000 on each and that restitution was made in the amount of \$14,500.

In assessing the past conduct of the Applicant, the Registrar, in the view of this Tribunal, must consider the totality of the past conduct of the Applicant. There was no evidence that Stogdill's business ethics over the past 16 years were ever in question until he became involved in consignment sales. It is true his driving record leaves much to be desired but when viewed in its entirety this record does not afford "reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty" and, therefore, under Section 5(1) of the Motor Vehicle Dealers Act, he would be entitled to renewal of his registration. In considering the guilty pleas under the Business Practices Act, should the Registrar have considered these as representative of Stogdill's past conduct as a registered Motor Vehicle Salesman or simply as an aberration? In the view of this Tribunal looking at the totality of his conduct, the lack of instruction, the reform both in practice and in the business forms

now used by Stogdill's employer, the Registrar should have concluded the latter.

This view of the Tribunal is not inconsistent with the decision of the Divisional Court in Re Brenner. The criticism of the Divisional Court was that the Tribunal in that case based its decision on the possibility of future reform of Brenner and or rehabilitation. In Stogdill's case, this Tribunal observes that his business conduct has not been demonstrated to be flawed over a period of 16 years except for the incidents resulting in the Business Practices Act convictions. Even in the Brenner case, the Divisional Court indicated that the Tribunal might find Brenner's conduct, including attitude over a one year period to have so improved that his past very serious criminal record would be overshadowed by such conduct. In Stogdill's case, the Registrar had before him Stogdill's past business record and the evidence of reform since 1988 which this Tribunal views as sufficient to have granted renewal of registration, but perhaps subject to some restrictions as is provided under Subsection 5(2) of the Act.

In the case of Re Jakobs (1987) 16 CRAT 223, both the financial ability and previous convictions were taken into account in denying registration. In that case the Tribunal pointed out that it was the Registrar's onus to show disentitlement to registration and, in fact, he had met that onus by showing that Jakobs flouted the law when pressed financially. No such circumstances have been presented to this Tribunal in regard to Stogdill.

In the Granger and Lee case (1985) 14 CRAT 88, the Applicants had a long history of many criminal convictions which again is not the case here.

In the Gary Williamson case (1987) 16 CRAT 266, convictions for very serious and substantial fraud with no restitution had been registered.

In all of these cases, the Applicants were seeking first entry into a regulated industry and their past conduct in other spheres of activity was very critically reviewed. In the current case, the Tribunal has the advantage of observing Stogdill's conduct in the very industry for which renewal registration is being considered over a 16 year period.

Another circumstance in this case disturbs the Tribunal. Evidence was presented that the Registrar is negotiating with Stogdill's employer, Huron Park Nissan Ltd., to continue the latter's registration as a dealer, but subject to certain conditions which were not disclosed to the Tribunal. No evidence



was submitted by the Registrar that the activities of Stogdill were worse than those of his employer, or that Stogdill was in any way specifically responsible for the charges against Huron Park Nissan Ltd. In fact, the greater fines assessed against the employer would seem to indicate the contrary. Yet the Registrar proposes to revoke the registration of Stogdill. Section 15 of the Canadian Charter of Rights provides that "Every individual is equal before and under the law and has the right to the equal benefit of the law without discrimination ..." If the Registrar intends to continue the registration of Huron Park Nissan Ltd. in the absence of a very precise explanation of why Stogdill should be treated differently, it appears to this Tribunal, on the evidence presented to it, that the registration of Stogdill should also be continued.

In view of the circumstances of this case, however, the Tribunal is of the opinion that some restrictions should be appended to the registration of the Applicant herein. Because the problems giving rise to the decision of the Registrar in his Proposal emanated from consignment selling and notwithstanding that there have been changes made in the practices of Huron Park Nissan Ltd., the Tribunal believes that as a condition of continuing his registration as a Motor Vehicle salesman, Stogdill should be prohibited from engaging in consignment sales or being employed by a dealer who is selling motor vehicles on consignment.

Therefore, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar not to carry out his Proposal, but to attach the following condition to the registration of the Applicant:

During the period of this license the Licensee shall not be employed by a Motor Vehicle Dealer engaged in consignment selling of motor vehicles and the Licensee shall file with the Registrar a certificate of his employer from time to time to this effect.



DISSENTING DECISION

The following is the decision of Gordon R. Dryden, Member.

I have read the judgment of the Vice-Chairman herein and, with respect, I am not able to agree with it. The Proposal of the Registrar of Motor Vehicle Dealers and Salesmen, against which the appeal to this Tribunal is brought, is to revoke the registration of the Applicant as a salesperson under the Motor Vehicle Dealers Act. The Registrar's decision was based upon conclusions that:

1. Stogdills' convictions under the Business Practices Act arise out of dishonest and illegal activity engaged in while registered under the Act. As such, the Registrar can not but conclude that Stogdill will not conduct business in accordance with the law and with honesty and integrity.
2. Lack of disclosure concerning past convictions under the Highway Traffic Act and Criminal Code, as evidenced by the Ministry of Transport certificate, illustrate further dishonesty on the part of Stogdill in attesting to the veracity of information, provided on the application.
3. Further the nature of these convictions reflect unfavourably on Stogdills' honesty and integrity. In particular, the convictions for unauthorized use of plates and driving without a licence afford reasonable grounds for the Registrar to believe Stogdill will not act with honesty and integrity, nor in accordance with the law.
4. Every person, such as the Registrant, if his registration is continued as a salesperson under any public protection statute, such as the Act, plays a significant part or assumes a position of responsibility in the business operations of the sale of motor vehicles, for the reason that, rightly or wrongly, members

of the public may be induced to think they have a right to believe or perceive the Registrant as a fit and proper person to deal with as a salesperson by the mere fact of registration by the Registrar.

5. Being aware of Stogdill's past conduct, the Registrar is quite unable or unwilling to expose the public to a risky situation, were he to continue to be registered as a salesperson under the Act.

There is little or no dispute between the parties as to relevant facts from which these conclusions were drawn, the only real issues being:

1. Whether the Registrar was justified in drawing his conclusions from them, and
2. Whether the exculpatory explanations of the Applicant should be accepted, and
3. If so accepted, should lead this Tribunal to conclude that the Registrar was "in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

See Southey, J. in Brenner vs. Registrar of Motor Vehicle Dealer and Salesmen, a decision of the Divisional Court of the Supreme Court of Ontario given on April 7th, 1983, where he says toward the bottom of page 4 of the judgment:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The relevant facts fall into two groups or categories, one concerning alleged dishonesty on the part of the Applicant in connection with consignment sales of motor vehicles in the course of his work as a licensed salesman, and the other with alleged

dishonesty in connection with a certain answer to a question which he made in a written application to the Ministry of Consumer and Commercial Relations for a renewal of his registration dated December 13th, 1988.

The alleged dishonesty in connection with consignment selling arises out of ten convictions, on March 9th, 1989, of committing unfair business practices contrary to Section 3 of the Business Practices Act, R.S.O. 1980, Chapter 55, following pleas of guilty upon these charges.

The evidence established that Mr. Stogdill, as sales manager for his employer/dealer, Huron Park Nissan Ltd. was the person in charge and control of the consignment sales of vehicles in question. The dealer also was charged in connection with these transactions and pleaded guilty to five charges. The evidence discloses that counsel for the Ministry agreed to ask for fines totalling \$5,000 against the dealer and \$2,500 against Mr. Stogdill and, in addition, restitution was made to 16 victimized members of the public in the total amount of \$14,500, in sums ranging from \$250 to \$3,500. It appears that this restitution was made by the dealer.

The pattern followed by Mr. Stogdill was as follows - a member of the public would bring in his vehicle to place it with the dealership on consignment for sale. Mr. Stogdill would negotiate a price with the vendor which it would be agreed he would receive if a sale was made and it was understood, that the dealership would spend a certain amount on the vehicle to render it more saleable and to provide a certificate of mechanical fitness, and that the dealership would keep as its profit whatever it could get from a purchaser over and above the agreed price to the vendor plus its costs of the certificate and the work done as forementioned. If no sale could be got, the vendor agreed to pay the dealer a specified amount toward the aforementioned costs. The salesmen of the dealer would then proceed to try and sell the vehicle.

In all of the cases of alleged dishonesty, Mr. Stogdill would, sometimes before they had a sale to a third party and sometimes after they had one, telephone the vendor and tell him that they could not get enough to provide the sale price to him upon which they had agreed, when, in fact, they had already done so or were able to do so and with a clear and straight misrepresentation of the true facts obtain his agreement to proceed with the sale on the basis of a reduced amount to be received by him. The dealership would then proceed with its sale to its purchaser and would keep the larger amount or difference as an increased profit. On documentation filed as Exhibits was shown,

in the same transaction, one sale figure on the documents given to the purchaser, and a lower figure on the documents given to the vendor. It was clear that Mr. Stogdill stood to benefit directly as well as indirectly from this as he was paid commissions and bonuses, based on his profitability to his employer as well as a salary. The evidence, and particularly the pleas of guilty to the ten charges establish that it was Mr. Stogdill in all of these cases, who made the misrepresentations as to the true facts to the vendors and that he did so knowingly.

The alleged dishonesty in connection with the answer to the question arises out of the answer to question 6 on the form: "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement", to which the Applicant answered "No". A search, conducted by the Registrar in August 1989, disclosed 18 convictions for speeding between February 22nd, 1979 and May 9th, 1989; two convictions for unauthorized licensed plates between April 21st and December 4th, 1987; one conviction for refusing a breathalyser test on November 14th, 1984; one conviction for driving without a valid licence on March 22nd, 1989; and one conviction for disobeying a red light on May 9th, 1989.

One of the speeding convictions on February 14th, 1989, was for 104 kms an hour in a 60 km an hour zone. I simply note this last as I think it relevant when considering the argument that the Applicant is one who learns and has learned from his mistakes.

I come now to the issues which I outlined near the beginning as being the real issues to be determined by this Tribunal, the first being whether the Registrar was justified in drawing the conclusion which he did from these undisputed facts. I shall deal with this issue first on the basis either that the Registrar did not have the exculpatory explanations given to this Tribunal or, that he did but either did not accept the same or, to the extent that he did accept them did not consider that they provided sufficient excuse for the conduct of the Applicant to cause him to change his conclusion and I shall, thereafter, consider how, if at all, these explanations should affect the conclusion.

To my mind, there can be little doubt that, on the face of his actions, the Applicant must in the absence of some exculpatory or mitigating factors, be found to be a person who has not conducted his business in accordance with the law and with honesty and integrity. Deliberately misrepresenting very material facts to third parties in circumstances where he knew that he would benefit personally if he could induce them, by these falsehoods to

change the terms of the contracts of assignment to their detriment has to come within the purview of dishonesty as laid down by the Tribunal on previous occasions and on occasion by the Divisional Court.

In Jakobs vs. Registrar of Real Estate and Business Brokers heard June 18th, 1987, by this Tribunal the Chairman said on page 4 of the decision:

...However the Tribunal must weigh the interests of the public against the interests of and sympathy it may have for the Applicant. On balance, the public interest must prevail in this case.

.....

...An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. 'Integrity and honesty' are not merely words. They are standards that must be met.

Again in Granger and Lee vs. Registrar of Motor Vehicle Dealers and Salesmen heard by this Tribunal on August 26th, 1985 at page 94 of the reported judgment, the Chairman said:

The key words in the relative section of the Motor Vehicle Dealers Act...are 'honesty' and 'integrity'. Members of the public are entitled to the assurance that salespersons with whom they have been dealing in these very serious transactions (often involving technical and other considerations beyond the scope of their own knowledge and experience) as well as the employers and principals of such salespersons shall be strictly and scrupulously honest.

In this context also I would include two quotations from the Vice-Chairman's judgment in Williamson vs. Registrar of Real Estate and Business Brokers heard on June 19th, 1987. In the first of these, she quotes from a decision in the case of Giovanni Giannini reported in 14 CRAT at p.179:



The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The second of these quotations is from the case of Ronald W. Northover 13 CRAT at p.292:

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

I shall now refer to the law as laid down relevant to the question of the false answer to the question on the application form. In my respectful opinion, this position has been correctly set forth very recently by the Chairman of this Tribunal in the decision of Doherty vs. Registrar of Real Estate and Business Brokers issued on January 2nd, 1990 where he says commencing at the middle of page 6:

The principle of full and correct disclosure on any application is set out in the decision of Gilford Garage Service Limited and Theodore Ambury (1982) 11 C.R.A.T. 52 at p.53.

The Tribunal is of the opinion that the application is basic to the



formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

In the decision of Peter Kodis (1985) 14 C.R.A.T. 187, the Tribunal commented on the failure of an applicant to list pending criminal charges and certain convictions as follows at p.190:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle

underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen they may have fairly free entry into homes, often they have the keys, and property is exposed. It has been pointed out to the Tribunal that during the period of employment as a real estate salesman, there were no adverse reports respecting the Applicant with regard to his dealings, no elements of fraud exhibited and, indeed, that he was a good real estate salesman. But the opinion of the Registrar and this Tribunal is not to be so restricted.

That approach was reinforced in the opinions further expressed by the Tribunal in the decisions of Orval David Bradt (1987) 16 C.R.A.T., p.202 and Cynthia Hayes (1988) 17 C.R.A.T., p.231.

I must now consider the exculpatory explanations for his actions offered by the Applicant to this Tribunal. With regard to the misrepresentations to the consignment vendors, he laid stress upon the fact that he had changed his practice and completely remedied the situation after the charges and now full disclosure is made of the true facts. He did not really try to say that at the time he made the misrepresentations, he did not know that he was doing anything wrong and, in my view, he could not have credibly have done this. On the point of the false answer on the application he said that he did not believe that traffic offenses needed to be included and said, "I had no idea the Ministry required this". Finally, both he and his counsel laid stress upon the fact that he had only worked for one employer from starting from school at quite a young age, and that no one, including the employer, had ever given him any instructions as to what should be honest or acceptable conduct or practises in relation to these matters and that he just did not know.

None of these excuses should assist the Applicant to escape the clear and, in my view, irrefutable inferences which the Registrar drew from his conduct. With regard to the correcting of

the practices dealing with the consignments, this was only done after he and his employer were caught and there is a strong presumption that, if they had not been caught when they were, the offending practices would have continued, with the resulting benefits to themselves, until either they were caught later or something else happened to cause them to discontinue what they were doing. With regard to question number 6 concerning the convictions on the form, in my view, the question is clear and unambiguous and, indeed, the same question with regard to which numerous members of the Tribunal had no difficulty on other occasions to find no excuse for a dishonest answer. With regard to the failure of his employer, or anyone else specifically to instruct the Applicant, this cannot be an excuse for failure to act with basic and fundamental honesty and integrity. The lapses of the Applicant here in this regard were not lapses based on some complicated or technical considerations, but rather on common and everyday understandings of truth and falsehood.

In his judgment herein, the Vice-Chairman expresses concern for an apparent inconsistency in the treatment afforded by the Registrar to the dealer and to the Applicant arising out of their convictions concerning the consignment selling. I, too, am concerned about this but I do not consider it a relevant consideration when determining whether or not the Registrar was correct in the conclusions which he reached concerning the Applicant. It is fundamental that "two wrongs do not make a right" and speculating that perhaps something different should have been done with regard to the dealer is not, in my view, of assistance to us in determining the issues before the Tribunal in this case.

Therefore, I have to conclude that the considerations which the Registrar apparently had in his mind when he reached the conclusions which he did are precisely the considerations to which he should give effect in carrying out his duties in protecting the public and this Tribunal should direct him to carry out his Proposal.

EDWARD J. TRYMBULAK

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
LUCIENNE BUSHNELL, Member  
WILLIAM J. GUIGNION, Member

APPEARANCES;  
EDWARD J. TRYMBULAK, appearing on his own behalf  
JANE WEARY, representing the Registrar of  
Motor Vehicle Dealers and Salesmen

DATE OF HEARING: 10 September 1990 Windsor

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to refuse to grant registration to the Applicant, Edward Joseph Trymbulak, as a motor vehicle salesperson. The reasons given by the Registrar for his Proposal are that:

- (a) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;
- (b) the applicant is carrying on activities, that are, or will be, if the Applicant is registered, in contravention of the Motor Vehicle Dealers Act or the regulations;
- (c) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The facts are as follows:

On January 23, 1989, Trymbulak applied for registration as a salesman with Motor City Auto Sales.

Earlier, on November 4, 1987, Trymbulak presented applications for registration under the Act as a salesman and for registration as dealer for his company, Trym Auto Sales Ltd.

By Proposal dated May 9, 1988, the Registrar proposed to refuse both of the above applications.

The Registrar noted that the Applicant was charged with possession of stolen auto parts obtained outside Canada. These charges were withdrawn on November 23, 1988 when his co-accused, Leo Gasparini, pleaded guilty and was convicted. Gasparini and the Applicant had carried on business together and the Applicant was an active participant in the business.

The Applicant subsequently withdrew his two prior applications made November 4, 1987, but requested that the Registrar proceed with processing the January 23, 1989 application for registration as a salesman for Motor City Auto Sales.

The first witness to testify was William McAlister, a Sergeant with the Ontario Provincial Police, who was a member of the auto theft section from 1983 until 1989.

He stated that he began an investigation of the Applicant and his company in the spring of 1987 because the Department had noticed a big influx of auto parts from the United States. These parts consisted mostly of car doors. When certain dealers were asked where these parts were obtained, the police were given bills issued by the Applicant's company.

In October 1987, he went to the Applicant's shop and saw a large quantity of General Motors doors (from 150 to 200 late model doors). In November 1987, under authority of a search warrant, the doors were seized.

Mr. McAlister noticed that the DIN numbers which could identify the origin of the vehicle had been removed, together with any identifying marks. Furthermore, the physical state of the doors showed signs of having been violently removed from the vehicles to which they were originally attached. To Mr. McAlister this was a clear sign that the parts had been stolen. It was later discovered that the doors were of U.S. origin from Detroit, although only four vehicles could be traced because of the obliteration of the identifying marks.

Mr. McAlister stated that the Applicant was present both times that he attended the premises and that the Applicant possessed the keys to the locks of the building and was apparently the person in charge.



The Applicant admitted that the profits of the enterprise were split - 60% in favour of him and 40% in favour of his partner Gasparini. The name of the business was Ed Trymbulak Auto Parts.

Mr. McAlister testified that the Applicant was also observed driving a trailer truck to the U.S. and bringing in the parts.

When he confronted the Applicant, he was offered no explanation. From that point on, the Applicant ceased the business of selling car doors.

Michael Hoggs, a detective with the Windsor police, testified that many of the cars stolen were of current models. Apparently vehicles in Detroit were stolen and stripped of the doors which were picked up by Mr. Trymbulak and brought across the Canadian border for sale to dealers in Ontario.

Mr. Denis Robertson of the O.P.P. testified that it was the Applicant who actively carried out the business; he arranged for and picked up the parts in the U.S. and delivered them to customers in Ontario. He was the one who filled out the Customs Declaration forms when taking the goods across the border. The role of Mr. Gasparini was to put up the necessary funds.

Mr. Robertson stated that the Applicant paid prices for the door which were at least 50% below the market price and, many times, far less.

The next witness, Mr. N. Marchand, an investigator with Canada Customs, testified that he checked the customs documentation prepared by the Applicant and found the value declared far less than the real commercial value.

He noticed, as well, that in some cases the Applicant put a higher value in the customs documentation than was listed in the invoice. He believes that this was done in order not to make Customs suspicious of the origin of the parts. He also believed that so many car doors were involved that the Applicant could not reasonably believe that the suppliers in the States had obtained these parts in the legitimate course of business.

Finally, he testified that there is presently a claim of \$365,000 against the Applicant for past duties and penalties because the values stated on the declaration were below fair market.

The next witness was Constable Power of the Windsor police. He testified that on April 19, 1989, he went undercover



to Motor City Auto Sales. The only person on the premises was Mr. Trymbulak. While there, the Applicant approached him and negotiated the sale of a car. After a price was reached, the Applicant presented him with a pre-signed contract by one Mr. Lucier as vendor. The Constable signed the contract under an assumed name in order not to alert the Applicant (Exhibit 15).

The Applicant filled out the balance of the contract in the presence of Constable Power. At the time, the Applicant indicated that his name was Leo Lucier viz. the signatory of the contract.

The next witness was Mr. Fred Maindonald, the Compliance officer with the Ministry of Finance and Consumer Relations. While conducting an investigation of Motor City, he saw records which included cheques payable by Motor City which had been cashed by the Applicant. He later noted that one such cheque represented payment of commissions on the sale of a car. This was, of course, in breach of the Act which makes it obligatory for any car salesman to be licensed.

When he asked Mr. Lucier about pre-signed contracts of sale, Mr. Lucier denied the existence of such contracts. Given the testimony of Constable Power, as well as the admission by the Applicant as to the existence of such contracts, it is clear that Mr. Lucier was not telling the truth. Thus, though indications on other cheques cashed by the Applicant were that they were for services other than selling cars, the Tribunal does not find this credible. It being in evidence that Mr. Lucier could not run his own business because he was confined to a wheelchair, the Tribunal presumes that other cheques given to the Applicant were for commissions as well. In any case, it is in evidence that one such cheque was payment of a commission on the sale of a car to a person named Hughes.

The final witness on behalf of the Registrar was the Registrar himself, Mr. Moody. He testified that he believed that the Applicant lacked integrity. This was demonstrated by his selling stolen parts and acting as a car salesman when he had no registration. He, therefore, rejected the Applicant's request for registration.

Mr. Trymbulak was the sole witness to appear on his own behalf. He admitted selling the car to Constable Power and giving a false name. He also admitted speaking to as many as six other potential buyers to try selling them a used car. None, however, actually purchased one.

Finally, the Registrar put in evidence Exhibit 18, an unsatisfied Judgment for \$34,483.26 against the Applicant.

The Tribunal believes that the decision of the Registrar to refuse registration to the Applicant was well founded. Mr. Trymbulak did not deny any of the evidence presented on the operation of his previous auto parts business and corroborated the evidence as to selling and attempting to sell vehicles while not registered.

From the evidence presented, it is clear that the Applicant knew or should have known that he was dealing with car parts of dubious origin in his former enterprise. The salesprices of the car doors, as well as the obliteration of any identifying marks and signs of violence, would have made it clear to any reasonable person in the car parts industry that the parts had been stolen. In participating actively in this enterprise, the Applicant clearly demonstrated behaviour which makes it unlikely that he will conduct business in accordance with law and with integrity and honesty.

The behaviour of the Applicant in 1987 showed a serious lack of scruples. His most recent behaviour indicates that his attitude has not changed. Specifically, he has sold and attempted to sell vehicles while not registered in flagrant breach of the Act. One can only conclude that he would show a similar lack of respect for the provisions of the Act after he is registered, as he has done before registration.

The purpose of the Act is to protect the public and give them confidence in salesmen of automobiles. Given the serious breaches by the Applicant, the Registrar exercised his discretion reasonably in refusing to grant registration to Mr. Trymbulak. His conduct does indeed afford reasonable grounds for believing that he will not carry on business honestly and with integrity.

In the case Brenner vs. Motor Vehicle Dealers and Salesmen heard in the Supreme Court of Ontario March 19, 1983, the Court held that, "Unless the Tribunal can find that it (past conduct) does not (afford reasonable grounds) the Tribunal should not order the Registrar to refrain from carrying out his Proposal."

The paramount duty of the Tribunal is to protect the public; the public must be able to deal with salesmen who are honest and in whom they can trust. The Applicant, Mr. Trymbulak does not satisfy these requirements.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

JIHAD WEHBE  
(WEHBE AUTO SALES)

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
JOSEPH GRAHAM, Member

APPEARANCES;  
JIHAD WEHBE, appearing on his own behalf  
JANE WEARY, representing the Registrar of  
Motor Vehicle Dealers and Salesmen

DATE OF  
HEARING: 21 June 1990 Ottawa

#### REASONS FOR DECISION AND ORDER

The Tribunal has deliberated and is prepared to render a decision at this time. The Tribunal first of all wants to acknowledge the comments of Mr. Jihad Wehbe with respect to reform and to show that he has developed and reformed. This is commendable. The Tribunal is always pleased to hear these sort of comments and to hear evidence of that.

On the other hand, the Tribunal is governed by decisions of higher courts than this Tribunal and, in particular, there is a case which is styled Re: Brenner in the Divisional Court section of the Supreme Court which dealt with a motor vehicle dealer's application, somewhat the same, but not quite the same.

In the case of Re: Brenner, the Applicant was applying for registration as a salesperson, not as a dealer. There is a distinction that has to be considered. In the case of a salesperson, that person is employed by a registered dealer and is, therefore, under certain controls and Mr. Wehbe has suggested to this Tribunal that certain terms and conditions might be appropriate and applied in this case.

It is very difficult for terms and conditions to be applied to a dealer; it is much easier to apply those terms and conditions to a salesperson and have that salesperson report to a registered dealer who in turn can be obligated to the Registrar under the Motor Vehicle Dealers Act.

Now in the case of Re: Brenner, the Divisional Court chastised this Tribunal for its approach in the Brenner case, where it had permitted Brenner to be registered as a motor vehicle salesperson on the basis that it believed genuinely that Brenner had reformed from a very lengthy and very serious set of criminal charges and convictions which he had had, so that it is proper for people who have had convictions to be considered to be rehabilitated and then registered as a salesperson or even a dealer under the Motor Vehicle Dealers Act.

But the Divisional Court said to the Tribunal, you proceeded upon wrong principles, in that you genuinely believed that the Applicant has reformed and that he would serve the Province well as a salesperson. The Court said to the Tribunal, you must look at the decision of the Registrar to see, if the Registrar acted reasonably in denying registration based upon the past conduct of the particular applicant. The Supreme Court of Ontario said you must look at that decision of the Registrar. Has the Registrar erred in his assessment of the past conduct? And in that particular case, it said that the Tribunal had erred in looking at simply the belief that the Applicant Brenner had reformed and would show reform in his future conduct. We were told by the Divisional Court that we would have to look at the past conduct.

The Court went on to say that past conduct can be recent conduct, it doesn't necessarily have to go back over a considerable period of time. It may very well be that it is something within the space of a year, may be something more than a year, may be something less; there can be demonstrated to the Registrar and subsequently to this Tribunal, as the matter comes before the Tribunal, that immediate past conduct far overcomes the very difficult things or awful things that have occurred in the past. It is under those circumstances that the Registrar and the Tribunal have subsequently since the Brenner case, where there has been sufficient proof of a period of good conduct and real demonstrated evidence of reform, granted registration.

Having said that, this Tribunal is bound by the decision in Re: Brenner and we bring that obligation to the facts of this particular application and the decision of the Registrar.

The Tribunal in its wisdom is ignoring the convictions that were applied in your case prior to 1988. Although, we may, on the basis of submissions that Ms. Weary has made, be entitled to look at those, we feel for the purposes of this decision we need not go behind 1988. When we do so, we have to look very seriously at your driving record.



In February 1988, you were convicted of driving while disqualified or prohibited. Your licence was suspended until November 15, 1992. That in itself is quite a long period of time for a suspension. Subsequent to that, there are additional convictions which would indicate that perhaps you were driving vehicles subsequent to those suspensions. The fact of failure to produce an insurance card would indicate that you were in some measure in control of a vehicle that you should not have been in view of the fact of the suspensions which had been issued against you.

The Tribunal recognizes that you were young, and that you have expressed to the Tribunal that you have reformed. Again, the Tribunal has to look at the fact that you are under some charges at the present time and while our Charter of Rights clearly indicates that every person in this country is to be considered innocent until proven guilty by a court of competent jurisdiction, we still have to look at the fact, that there are these clouds hanging over you at the present time. Coupled with that is the fact of the application itself. The Tribunal is not going to accept the position of the Registrar that there were perhaps suspicious circumstances upon the three addresses. We do not think that is appropriate for us on the basis of the evidence that has come before us and on evidence that has been given by your wife and by your cousin as well. So that we do not feel that we have to deal with that particular issue. We do not make any comment with respect to the Registrar's opinion which he had at that time. He did not have the benefit of your wife's testimony and that of your cousin as well which we have had today.

Notwithstanding, in the application, there were a number of questions which were not fully answered and again the Tribunal can acknowledge that perhaps as a young person, you may not have fully understood those questions. You may not have intended deliberately to deceive the Registrar, nevertheless, there was an obligation on you to reveal to the Registrar in the application the facts of these charges that were outstanding, the fact of the convictions and the facts of the judgment against you.

We would certainly caution that in any future application you make to the Registrar, that there be full and open disclosure of those things which you are required by law to provide.

It, therefore, appears to this Tribunal that the granting of a registration to you Mr. Jihad Wehbe under the Motor Vehicle Dealers Act would be premature at this time.

We would point out to you that Section 8 of the Act clearly provides that "a further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed." It appears to this Tribunal from the argument that you have put forward, the exhibit which you have filed regarding your participation in the Toronto Business School, your intent to conduct studies at the University of Ottawa; all of these are factors which on a subsequent application would be given proper consideration by the Registrar acting in his capacity as a protector of the public interest.

These are factors which could be put together to show more recent history and to show in fact strong evidence of the fact that you have reformed and matured to a position where you could conduct yourself in a proper business fashion and be a credit to the country in which you live.

At this point in time, however, this Tribunal after having heard all of the evidence, and the submissions, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out the Proposal.



WAHIDE WEHBE  
(WAHIDE WEHBE AUTO SALES)

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
JOSEPH GRAHAM, Member

APPEARANCES;  
JIHAD WEHBE, as agent

JANE WEARY, representing the Registrar of  
Motor Vehicle Dealers and Salesmen

DATE OF  
HEARING: 21 June 1990 Ottawa

REASONS FOR DECISION AND ORDER

The Tribunal met and considered the evidence which had been presented to it with respect to the Registrar's Proposal. Essentially, the evidence that has been put forward by the Registrar required the Applicant, at least the registrant, to file or provide some evidence to the Tribunal as to the conduct of business. There was some indication that forms had been ordered which would bring this business into compliance with the Act, but there has also been evidence that, in fact, sales have taken place which were made prior to the receipt of any proper Bills of Sale or other documents that are required under the Regulations of the Act.

In the establishment of any business, one of the things that is extremely important is the compliance with the statute, particularly in a regulated industry such as the Motor Vehicle Dealers Act and this requires any applicant and any registrant to assure himself or herself of having the proper documentation to record the conduct of its business in accordance with the terms of the Act.

The registration occurred in April of 1990, and the indication in the final Exhibit which was filed was that an order for forms was made at the end of May or early June of 1990. And yet in the meantime, certain sales have taken place and that has

not been denied by the registrant. This is a breach of the Motor Vehicle Dealers Act.

In addition, it is difficult for the Tribunal to accept the fact that someone who is recently in this country does not have staff capable of responding to the requirements of the Act; of communicating with the Registrar, and that would be something that is extremely important. Any one carrying on business in the Province of Ontario has to obey the laws of the Province of Ontario and the laws which are established in this regulated industry established under the Motor Vehicle Dealers Act.

If such person cannot understand French or English, it is extremely important that that person hire someone to be able to work closely with that individual in order to conduct a business. I have previously today indicated that circumstances are perhaps a little bit more liberal in the case of a registered salesperson, than in the case of a registered dealer. A registered dealer has a direct obligation to the public and to the Registrar under the Motor Vehicle Dealers Act and must be able to communicate and to respond to any questions, any inquiries or any investigation that may be made by the Registrar.

Furthermore in this particular situation, the fact of the registration indicates that the premises from which business will be conducted are located in the Township of Osgoode, and a specific address was given. Under the Motor Vehicle Dealers Act, it is required that there be premises from which the operations of the business are conducted. They must be so identified; there must be an appropriate sign; there must be appropriate records available at such location; and there must be an appropriate office. This is because, being a regulated industry, the registrant must be able to be contacted by the general public by persons with whom that registrant has dealt with the Registrar or any officers appointed by the Registrar to examine the records and operations of the business.

In the case of this registrant, that has not occurred. There has been some evidence given that the premises from which sales have been conducted are perhaps in three locations: one where the restaurant is identified in the Township of Osgoode, one at the residence of the registrant and one from another garage.

There has been evidence brought forward indicating a willingness on the part of the registrant to prepare and comply with the Act, but the circumstances which we have identified at this time, do not appear to give the registrant an opportunity to comply. She is just not, at this point in time, in her career, in the Province of Ontario, capable of handling the obligations which

are required of a dealer registered under the Motor Vehicle Dealers Act.

Let me state that there has been no evidence whatsoever given to this Tribunal to justify the Registrar's opinion that the past conduct of the registrant affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty. It appears to this Tribunal that the Registrar may have in his initial examination been led to that conclusion, but the evidence before this Tribunal falls short of proving that proposition.

However, the second reason for revoking the registration, as submitted by the Registrar, is that the registrant is carrying on activities that are in contravention of the Act or the Regulations. And perhaps, unfortunately, for the registrant these activities have, in fact, been fully proved to the satisfaction of this Tribunal.

It may very well be, as I have said, that it is because of a lack of understanding of the language with which one must conduct business in the Province of Ontario. It may be that it is a lack of understanding of the content of the statute itself. It certainly behooves any of us who may travel from one country to another, that if we are going to carry on business in our new country, a country that we are going to adopt as our country of business, that we learn very carefully the laws of that country. Whether that country is Canada, whether that country is Lebanon, it does not matter. One must learn quickly what the laws of that country are before one starts to conduct business. Because otherwise, the result is going to be the situation that in a regulated industry, one is going to find your registration revoked. It is unfortunate that that is the position that the Tribunal finds itself in in these circumstances.

Again, I would point out, that there are provisions in the Act, where registration can be applied for in the future when someone is qualified, capable of understanding of how matters are to be conducted or when one has attained help by hiring employees or some people capable of understanding what the laws of the Province are. But unfortunately, at this time, on the basis of the evidence which has been presented to this Tribunal, we have no alternative but to proceed.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, we direct the Registrar to carry out his Proposal in these circumstances.

It has been brought to our attention in fact in the evidence which was put forward by the Registrar, that clearly the Applicant was not carrying on business at premises as was required under the Act. This further indicates to the Tribunal that it is appropriate for this Applicant to have her registration revoked, and so therefore, we do proceed to direct the Registrar to carry out his Proposal.

RABAH ZAHABI  
(GENERAL AUTO SALES)

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
J.T. HOGAN, Member

APPEARANCES:  
JANE WEARY, representing the  
Registrar of Motor Vehicle Dealers & Salesmen

No one appearing for the Applicant

DATE OF  
HEARING: 16 January 1990 Toronto

REASONS FOR DECISION AND ORDER

The Registrar issued a Proposal to revoke the Applicant's registration as a dealer under the Motor Vehicle Dealers Act (the "Act"). The Applicant requested a hearing before the Tribunal pursuant to Section 7(4) of the Act and was duly served with the Appointment for this hearing. The Applicant, however, failed to appear and the Tribunal proceeded with the hearing in his absence.

It was clear from the evidence of the Registrar's inspectors who attended at the Applicant's registered business address in May of 1988, and in June of 1989, the Applicant was not, in fact, carrying on business at that address. Specifically, there was no sign clearly visible to the public identifying the Applicant's business name, which is registered as "General Auto Sales". Furthermore, there was no indication that the Applicant was maintaining an office at the registered business address, or any indication that motor vehicles were being offered for sale by the Applicant at that address.

The Applicant was not present at the registered business address on either inspection date. The Tribunal finds that the Applicant has breached Section 12(3) of Regulation 665 under the Act which makes it a condition of registration as a motor vehicle dealer that the motor vehicle dealer:

- (a) operates from premises located in Ontario that are approved by the Registrar;
- (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates, and
- (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name;

Under Section 6(2) of the Act, a dealer's registration may be revoked where the Applicant is in breach of a condition of the registration. The Tribunal considers such revocation to be appropriate in this case and by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act directs the Registrar to carry out his Proposal.



ANDREOLI HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
JOHN HURLBURT, Member

APPEARANCES:  
STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 31 October 1990

Toronto

REASONS FOR DECISION AND ORDER

In view of the evidence presented, in particular, the uncontradicted evidence of Mr. Wilkinson with respect to the convictions which have been registered pursuant to charges under the Ontario New Home Warranties Plan Act, the Tribunal is clearly of the view that the provisions of Section 7(1)(b) and 7(1)(c) apply in this case.

First of all, with respect to the provisions of Section 7(1)(b), "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on his undertakings in accordance with law and with integrity and honesty", it is the view of the Tribunal that this is applicable with the corporation having been so charged and convicted. Under the provisions of Section 7(1)(c) dealing specifically with the corporation, the Act provides that an applicant is entitled to registration except where subclause (ii) provides that "the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty".

Under the provisions of these subsections, the Tribunal is satisfied on the evidence that the Applicant is not entitled to registration and that the Registrar has acted properly in refusing the application under the provisions of section 8 of the Act. Accordingly, by virtue of the authority granted to this Tribunal under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to carry out his Proposal.

SURJIT K. ARORA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
D.H. MACFARLANE, Member

APPEARANCES:  
SURJIT K. ARORA, appearing on his own behalf  
STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 4 June 1990 Toronto

REASONS FOR DECISION AND ORDER

The appellant, Surjit K. Arora purchased a home at 9 Meadowlark Drive, Brampton and took possession on August 30, 1988.

Of the 54 complaints he filed with the Ontario New Home Warranty Program on August 22, 1989, all seem to have been satisfactorily addressed by the builder except 9 which form the subject of this appeal.

These are:

1. Brick work developing cracks all around the house - after repairs more cracks appear.
2. Garage door - Every time it rains, it becomes hard to close. Builder has tried to repair it three or four times.
3. Closet doors - Gap between doors and wall.
4. Main entrance door - Wide gap at bottom.
5. Archways from kitchen to living room 1/4" out.
6. Noisy ducts under the floor.

7. Archway between kitchen and dining room offset.
8. Living room and dining room archways offset.
9. Air duct in the family room noisy.

With regard to the archways (complaints Nos. 5 - 7 and 8, evidence was given by Mr. Jack Sutherland on behalf of the Program that they are done in a good and workmanlike manner and perhaps 1/16 of an inch out and no more. The builder's representative, Mr. L. Lanaro, also testified to the effect that it would be difficult to notice any discrepancy in the archways without a level. We accept this evidence, there appearing to be no breach of the Building Code or fault in workmanship or materials as required under Section 13(1) of the Act. These claims are, therefore, disallowed.

With regard to the brickwork, it appears from the evidence that some work had been done in August 1989 at which time all the cracks had been repaired. Mr. Arora, however, says that more have appeared. The builder has undertaken to repair this brickwork to the best of his ability and we hereby direct the necessary tuckpointing be done.

The builder's representative has further undertaken to make whatever repairs are required to the garage door and we hereby so direct.

The closet doors would appear to require only adjustment to fit properly and the builder has undertaken this repair.

From the evidence only the front door sweep would appear to require adjustment and the builder again has agreed to this repair.

The sixth complaint involves noise from the floor duct which the builder has agreed to eliminate if the appellant will show him the problem which also involves complaint No. 9.

It is rare in these matters under the Ontario New Home Warranties Plan Act coming before the Tribunal that we have so compliant a builder undertaking to address all the complaints of the appellant.

Mr. Lanaro has done that on behalf of Landford Development Ltd. and we accept his word. It appears from his evidence the company has and will attempt to satisfy the homeowner and this is far from an adversarial attitude between the parties.

To ensure there is no misunderstanding between the parties and this Tribunal, we hereby order the Program to address the six complaints - Nos. 1, 2, 3, 4, 6 and 9 forthwith.

The claims arising from the three complaints, Nos. 5, 7 and 8 are hereby disallowed. Mr. Arora in order to give effect to this decision will allow the builder access to the home at reasonable times to complete the work.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow claims Nos. 1, 2, 3, 4, 6 and 9, and to disallow Nos. 5, 7 and 8.

ASHLEY OAKS HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
DR. STEPHEN G. TRIANTIS, Member  
D.H. MACFARLANE, Member

APPEARANCES:

JOSEPH SEREDA, representing the Applicant

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 2 April; 18, 20, 25 June 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Ashley Oaks Homes Inc. from the decision of the Registrar of the Ontario New Home Warranties Plan Act refusing to renew the company's registration as a builder pursuant to Section 8(2) of the Act.

The Proposal of the Registrar enumerated four grounds for refusal, but since the first two were withdrawn by counsel for the Registrar at the opening of the hearing, we will deal only with the last two. These allege failure to comply with the recommendation and directions of the conciliation reports and secondly, failure to indemnify the corporation for its expenditure on behalf of two homeowners in the sum of \$17,250 and \$36,800 as provided in subsection (4) of Regulation 728 of the Act.

This matter had originally come before the Tribunal on the 2nd of April, 1990 at which time the appellant requested an adjournment which was granted and the following Order made:

O R D E R

The Appellant's application for an adjournment is hereby granted upon the following terms and conditions:

1. That he deliver to counsel for the Ontario New Home Warranties Plan a letter of credit drawn on the Canadian Imperial Bank of Commerce

in the sum of \$47,000.00 in favour of the Ontario New Home Warranties Plan within ten days of this date pending such further order of this tribunal or other forum and without prejudice to the appellant's right to make such application as may be advised. In default, the Registrar is hereby directed to carry out his proposal.

2. Those particulars as may be demanded by Counsel for the appellant and within the possession of Counsel for the Program shall forthwith be made available to the appellant.

3. This matter is hereby adjourned until June 18 next at 9:30 a.m. at which time it will proceed.

Toronto Apr. 3/90

James G. Leslie, Vice-Chairman

The appellant complied with the Order; the matter now comes before this Tribunal for consideration on its merits. Since there are two homes involved and two owners, we will deal with them as separate issues.

The first involves the complaints of Mr. and Mrs. Mule who had purchased a home from the appellants at 62 Sweet Oak Court, Brampton and was the subject of a conciliation inspection on March 3, 1988. The conciliation officer, a Mr. George Hanna, noted the following:

EXTERIOR BRICKWORK IS CROOKED AND HAS AN EXTREMELY POOR APPEARANCE; Builder to carry out remedial work to the exterior brick veneer to meet the criteria noted below:

1. All mortar joints on brick veneer must meet requirements of 9.20.4.2 of the Ontario Building Code. This requirement specifies full head and bed joints.

2. All mortar used on exterior brick veneer must comply with the minimum requirements of table 9.20.3.A of the Ontario Building Code pertaining to the quality of mortar.



3. All areas of exterior brick veneer that do not meet requirements of item numbers 1 and 2 noted above, shall be professionally tuck pointed.

4. Upon completion the mortar joints of brick veneer shall have a workmanlike consistency in regards to tooling, texture and colour.

5. All precast windows sills shall meet requirements of 9.20.13.5.(2) or 9.20.15.4 of the Ontario Building Code.

6. Upon completion of all of the aforementioned requirements, all residual surface mortar spatter shall be removed from exterior brick veneer. When completed the entire exterior brick veneer shall have a neat and clean appearance as would reflect a good standard of workmanship. If any replacement bricks are required, they shall be of equal or similar design and quality and match existing as close as possible. Due to winter working conditions the builder shall use his own discretion in scheduling the remedial work but it must be completed on or before June 1, 1988.

In an attempt to comply with the report, the builder employed his brick contractor to complete the repairs and subsequently wrote to the Program on June 21, 1988, as follows:

Please be advised that our brick contractor completed the repair to the brick work on Tuesday, June 21, 1988.

My contractor stated that the owner is satisfied and we feel that this complaint is now at an end...

Mulé wrote to the Program on June 23 indicating his dissatisfaction with the work and directed a copy of his correspondence to the builder. The appellant replied on June 28 as follows:

We have received your letter dated June 23rd, 1988, whereby surprisingly to us you are changing your statement in reference to your brick work and all of a sudden you are unsatisfied again. We apologize for not having the answer to your concern since you are changing your mind on a daily basis.

.....

The Program wrote to the builder on the same date to the effect that the work done was only of a minor nature and neither addressed the problem nor complied with the conciliation report.

This letter will serve as a confirmation of our receipt of your most recent correspondence dated June 21, 1988.

Enclosed please also find a photocopy of a letter from Mr. and Mrs. Mulé dated June 23, 1988, which would appear to be in total conflict with the information provided to you by your contractor.

The remedial work specified for the brick veneer on the Schedule "A(1)" if adhered to as intended was quite extensive and not of a minor nature.

The intent of the report would have required action of a genuine and effective nature to raise the existing brick veneer to a professional standard, falling short of the total replacement of the veneer.

.....

Please insure that you take full advantage of this in insuring that the remedial work to the exterior brick veneer is of the highest quality. Particular attention should be addressed to the requirements of the Ontario Building Code, Section 9.20.4.1., i.e. maximum thickness of an individual joint shall be 20 mm. The existing vertical alignment of the veneer on the East and front elevations should be carefully examined and any replacement bricks, if required shall be of equal or

similar design and quality as noted in our original report.

But in the homeowner's words, he now had three different colours of mortar and the brickwork was still crooked. The Program's inspector, Paul Poirier attended at the premises on August 15 and concluded:

In regards to the masonry, it is the Program's opinion that while the repointing is helpful it is a totally inadequate response to resolving the condition of the brick work as indicated on the Conciliation Report and re-affirmed by the inspection. The unevenness of the walls, the excessive mortar joints and the off-level bricks cannot be resolved by pointing and in our view can only be satisfactorily resolved by replacing all or most of the brick work.

Due to the extensive nature of the last repair the Warranty Program is prepared to allow the builder additional time providing he acts immediately upon receipt of this letter.

This is the Program's final position on the matter and pending the outcome of the above, no further action will be taken unless the builder is unable or unwilling to meet these commitments.

As a result of the impasse, the builder then engaged the services of Reltuc Development and Construction Consultants to provide an independent report. A Mr. Cutler in that report which was sent to the Program states:

My inspection of the building, indicated by the photographs (approx. 20 ft.) enclosed, clearly indicates that the Clay Brick used, and the visual distance required, do meet the requirements of the CSA Standard CAN/CSA-A82.1 "Burned Clay Brick".

In my opinion the masonry workmanship of this brick veneer home is unfortunately

typical of the residential industry standards today, not only for brickwork, but other construction trades; and is a matter of concern to all of us.

But any thought of replacing all of the brickwork on this particular residence, in my opinion, would be totally irresponsible; as if this course of action is demanded (usually by owner pressure), then hundreds of other residences in Ontario should also receive similar treatment.

Mr. Cutler then concludes with six recommendations concerning repair and replacement of the bricks in various areas. The builder in the letter accompanying the report advises that he is prepared to proceed with this work. This was received by the Program on September 28, 1988.

The Program's reply is reproduced in toto since it is the last correspondence between it and the builder prior to its notice to Ashley Oaks Homes Inc. on December 5 that it was in default and that all future work would be done by a contractor engaged by the Program.

#### ONTARIO NEW HOME WARRANTY PROGRAM

October 11, 1988

REF. 10-3158-203536  
10-3158-203532

Ashley Oaks Homes Inc.  
920 Dundas Street East  
Mississauga, Ontario  
L4Y 1B8

ATTENTION: Mr. P. Mahon

Dear Sirs:

RE: Mazzatenta, 34 Sweet Oak Court, Brampton

Mule, 62 Sweet Oak Court, Brampton

We have reviewed the reports submitted by your consultant regarding the above residents and while they allude to some faults in workmanship

they are far from being detailed or conclusive. It would appear that Mr. Cutler has simply chosen to ignore many of the faults by stating that the workmanship of these homes is typical of the residential industry standards today.

Be that as it may, the Warranty Program is entrusted with the responsibility of administering an Act which requires every vendor of a home to warrant to the owner that the home be constructed in a workmanlike manner and free from defects in material and further that it be constructed in accordance with the Ontario Building Codes.

It is our opinion that neither of the above homes meets these requirements as viewed not only from our own experience but from past discussions rendered by the Commercial Relations Arbitration Tribunal on similar cases involving faulty brickwork.

Be advised therefore, that the Warranty Program's report and not that of your consultant will be used as the guideline in any controversy regarding remedial work undertaken by the builder.

Hoping this makes our position clear and that we can anticipate your expeditious co-operation in resolving this matter.

Yours truly,

P. Poirier  
Inspector/Technical Representative  
PP:jm

On November 16, 1988, the Program received the following quote from Uni-Tri Masonry Limited:

**UNI-TRI MASONRY LIMITED**

November 16, 1988

UDAC  
150 Edna St.  
Kitchener, Ont.

Attention: Mr. Paul Poirier

Dear Sirs:

Re: 62 Sweetoak Court

Please be advised that we have seen the above premises and find that 50% of the existing masonry (brick) work should be torn down and replaced.

To complete the necessary work which includes:

Tearing down of faulty brickwork.

Tying in of remaining brick to new masonry work.

Labour, materials (masonry, brick, brick ties, nails, black paper, poly, sand) all incidental relating to completion of masonry.

Equipment and tools to tear down and rebuild.

\$15,000.00

Note the price relates to spring time works only.

Yours truly,

Eduardo ....  
President

Subsequently, Mr. Robert Bero, on behalf of the Program, entered into negotiations with Mr. and Mrs. Mulé which resulted in an agreement to pay them \$15,000 representing the cost of the work in consideration of a complete release. The matter was thus concluded on December 5, 1988, the same date the builder was advised it was in default and on February 3, 1989, Mulé received his cheque.

The facts as we have detailed them are not in dispute and it remains for this Tribunal to determine whether or not the Program was premature in its payment to Mulé as argued by Mr. Sereda and whether the amount paid was consistent with the repairs required to be done.



The evidence of Mr. Paul Poirier, a conciliator with the Program for the past seven years, and a former inspector with the Metro Housing authority for some eight years, was corroborated by photographs, Exhibits 8 and 9, and recites the following deficiencies: "voids in the brickwork, brick parged, code infractions, poor workmanship, excessive joints and brick facing not flush, bonding in brick bad, head joints not aligned, spacing in brick, corner out of plumb, joints varied and wide, bricks cut short, poor filling in with brick, brick column at front entrance twisted, brick bows out in places".

He concurs with the previous conciliator, Mr. Hanna in condemning the workmanship and recommends the whole front of brick be replaced, together with some other areas. He also notes the builder had made some attempts to repair between the first and second inspections, but these were insufficient to alleviate the situation.

A Dr. J. Amini called by Mr. Sereda on behalf of the builder, testified that the Mulé residence did not require rebricking in its entirety. He said the hardness and quality of the mortar was satisfactory. He did admit, however, that there was a problem from the point of view of aesthetics and to bring that up to standard might cost \$1,500 to \$2,000. He also observed that to rebrick one-half the house would cost approximately \$6,000 to \$7,000. In general terms, he agreed with the Cutler report.

The President of Ashley Oaks Homes, Mr. Drago Vukovic, in his evidence, said that he had been in the building business for 20 years. He had told Mr. Poirier he did not wish to see any cash settlement, but was happy to repair the house. He said that he had hired Cutler to try to satisfy the homeowners (Mulé and Mazzatenta) since for the past eight months he had been unable to do so. He pointed out that both the Mulé residence and the Mazzatenta homes (which we will deal with later) were the same price, the only variation being in the location which made the Mazzatenta house \$9,000 more. Asked about the number of bricks employed in the construction of each house, he said there were 10,600 to 12,000.

Mr. Vukovic pointed out that he had built 594 homes under the name of Ashley Oak and had only 4% conciliations. It is not material to our decision, but the witness further observed that Mulé's home was purchased for \$159,000 and he subsequently sold it for \$237,000 making a profit of \$82,000 and gained a further \$15,000 from the Program which he did not put into repairing the house.

The history of the Mazzatenta residence is similar to that of Mulé and need not be reiterated here. Also built by Ashley

Oak, this house was purchased by Mazzatenta and occupied on May 22, 1987. The same problems with the brickwork endured by Mulé were experienced by Mazzatenta. Inspected by Mr. Hanna, the Program's conciliator, the recommendation was made that the brickwork should be removed in its entirety and replaced. The cumulative effect of bad mortar, infractions of the Building Code, excessive joints, brick below grade and not level and bricks of varying colours - all lead to the inescapable conclusion that the bricks had to be removed and the complete work done again.

Having given the builder notice on July 4, 1988, that the work was to be completed within 45 days and later extending the date when it was not done, the Program finally obtained estimates from Gamp Construction for \$34,600 and from Amac Masonry for \$32,000 to complete the work on Mazzatenta's house. These quotations were dated December 1, 1988 and October 24, 1988 respectively.

The Program then notified the builder on December 15, 1988, that the firm was in breach of warranty and any further work would now be undertaken by the Program's contractor. On January 9, 1989, Mazzatenta was favoured with the following letter from the Program:

#### ONTARIO NEW HOME WARRANTY PROGRAM

DATE: January 9, 1989

REF. 10-3158-203536

Mr. & Mrs. Mazzatenta  
34 Sweet Oak Court  
Brampton, Ontario  
L6Y 2S5

Re: MAZZATENTA p/f ASHLEY OAK HOMES INC.

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Dear Mr. and Mrs. Mazzatenta:

This will confirm recent conversations you have had with our office, in particular with our Mr. Paul Poirier.

It has been agreed that the Warranty Program, as a full and final settlement of your claim, will pay you \$32,000.00.

We have attached our standard Release, for you to date, sign, have witnessed, and resubmit to this office, and to the attention of the writer.

Immediately, upon our receipt of the above executed documentation, the Warranty Program will arrange to have a cheque in the amount of \$32,000.00 sent to you, and this matter will then be concluded in its entirety.

Please note that your Vendor's one year Warranty commenced on your home May 19, 1987, and expired in its entirety one year later on May 19, 1988, that Warranty period has now been extinguished.

The Warranty Program is certainly glad to be able to assist you in this matter.

Yours truly,

Robert A. Bero  
Regional Manager  
South Western Ontario

RAB/dn  
Encls.

On February 27, 1989, Mazzatenta received his cheque for \$32,000 and the matter was concluded.

As with the Mulé claim, we are faced with the similar issue as in the Mazzatenta case, whether the Program in fulfilling its obligations under the Act acted prematurely in its payment to the owners and whether that payment was justified.

In both cases, the evidence clearly shows that the builder was given ample time to repair what was very bad workmanship in both homes. It was not until December 15, 1988, that the Program gave notice of the breach of warranty and took matters into its own hands. We find as a fact that the builder in both the Mulé and Mazzatenta contracts was in breach of warranty under Section 14(1)(b) of the Act as a result of which each owner had a cause of action against the builder. The section continues:

the person or owner is entitled to be paid  
out of the guarantee fund the amount of

such damage subject to such limits as are fixed by the regulations.

.....

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

The Corporation elected to make a payment to each of the owners instead of attempting to repair the homes as a result of which the Corporation is subrogated to all rights of recovery against the builder pursuant to Section 17(1) of Regulation 726. In our view, the action of the Program was entirely justified, sufficient notice having been given to the builder and the Program's action was clearly not premature.

With regard to the second question, however, dealing with the quantum of payment to the owners, we take issue with the Program. The evidence of the builder is, we believe, unequivocal that there were 10,600 to 12,000 bricks in each home. In view of that number, we consider the payment to Mulé fair, but the estimate of \$32,000 to replace 17,000 bricks in the Mazzatenta house, we consider extravagant and the payment accordingly unjustified.

The builder's figures which we are prepared to accept are as follows:

10,600 brick @ \$700 per 1,000 labour	\$7,420.00
10,600 brick @ \$350 per 1,000 material	3,710.00
Ontario Retail Sales Tax	296.80
Shipping	200.00
Removal of 10,600 brick	<u>3,500.00</u>
Total	<u>\$15,126.80</u>

We consider the addition of a further \$1,500 for sand, mortar, mix, flashing, brick ties, etc. to be fair making a total of \$16,626.80, together with the 15% administration fee charged by the Program.

Mr. Sereda, counsel for the builder, has argued that the Act is unfair in that there are some gaps in it where the legislation is deficient. He notes that only the owner can come to this Tribunal for redress and not the builder who has no status under Section 16 of the Act. That is true, but we might point out

that there is provision under Section 17(4) of the Act for arbitration - an avenue which is available to the builder as a vendor.

By the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the builder Ashley Oaks Homes Inc. will have 30 days from the date of release of this decision to indemnify the Ontario New Home Warranty Program in the sum of \$31,626.80, together with the 15% administration fee charged by the Program and file a new application for renewal and in default thereof, the Registrar is directed to carry out his Proposal.



DOUG BENNETT

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
ALBERT LONGO, Member

APPEARANCES:

DOUG BENNETT, appearing on his own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 7 May 1990

Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Doug Bennett are the owners of a new home at 6546 Tenth Line West, in Mississauga. Their four claims for certain repairs result from a conciliation done at their home on December 12, 1988 when a representative of Geranium Homes was present. There was a reinspection on March 22, 1989.

The original list of some 71 deficiencies was submitted by Mr. Bennett on February 1, 1988, and nearly all of those items were eventually resolved.

The major concern that the Bennetts have is about the brickwork on their home. The builder has agreed to re-brick their home, now that they have chosen another style of brick since their original type which they would prefer is no longer available. Difficulties in reaching a decision on the choice of brick have resulted in a year passing by; however, the work as agreed by the builder and done under the protection of the Ontario New Home Warranties Plan is to proceed in the next few weeks.

There remain four small items to be decided upon. The evidence on each of those items and the Tribunal's decision on each is set out herewith:

I. The kitchen counter had been fitted to its wall which was bowed out. The builder removed the counter, straightened the wall and then fitted the counter to the new wall. A hole was made



in the counter which was filled and coloured, but now has some hairline cracks. A mark appears on the edge of the backsplash but otherwise Mr. Bennett agrees that the work was well done.

The bowed wall had been voluntarily repaired by the builder when the New Home Warranty Program found that the problem was not excessive and was not warrantable. The Plan notes the blemish near the wall plug, but sees no need to replace the counter.

The Tribunal finds the voluntary work done by the builder to fix the bowed wall and the replacement of the re-fitted counter were not required as warranted items. The photographs submitted show very little blemish or nick, and we find that nothing more is required of the builder in this item.

II. The front doors had loose handles which the builder agreed to repair. A key was given and lost so the Bennetts required that the locks be changed, which was done voluntarily by the builder. Mr. Bennett complains that some damage was done around the lock area so that the wood core is cracked and splintered, and that the lock and bolt mechanisms are not true so that one must lean against the door to align the bolt for turning.

The New Home Warranty Program inspector, Mr. Richard Johnston told of his five visits to this property and that the door lock was tried and worked well, although with the use of magnetic weatherstrip some pressure is needed to insure a tight fit. Some adjustment to the striker plate may be useful, but no new drill holes or other problems were seen by Douglas Irvine, a second New Home Warranty Program inspector who was also a witness before the Tribunal.

The Tribunal finds that any splinter from the wood core in the front door may likely have come from normal wear and that repairs done were not under any warranty. The Tribunal has no requirement of the New Home Warranty Program to have further work done on those front doors.

III. When the locks were changed as well on the rear door and the garage door, cracks in the garage door core occurred which were filled with white silicone. Mr. Bennett complains that this was not a good and workmanlike repair and that proper wood filler should have been used. The Tribunal finds that the repairs entered into for the door were not well done, and directs the New Home

Warranty Program to ensure that the builder does a satisfactory repair and to inspect and approve the repair work.

IV. In the laundry room, the door frames were undercut to receive the vinyl floor sheeting, but a gap occurred which has not been satisfactorily covered by a piece of quarter-round. It is obvious from the photographs submitted in evidence that properly cut and fitted quarter-round can mask the gap or that a small insert patch with a sealer would make a great difference in appearance. The Tribunal finds that it is not necessary to replace the floor in the laundry room. Otherwise, the Tribunal directs the New Home Warranty Program to ensure that repairs as suggested are carried out to resolve the complaint of the gap which is acknowledged to be a warranted item.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claims for the garage door and the laundry room flooring as set out in this decision.

MARCEL CADIEUX

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

MARCEL CADIEUX, appearing on his own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF	31 May 1989	Toronto
HEARING:	11 June 1990	Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered February 20, 1989, disallowing various claims of Mr. Cadieux arising from the construction of his home by Roger G. Carriere Construction Inc. The claims are based on Section 13(1)(a) of the Ontario New Home Warranties Plan Act and were made within the first year of Mr. Cadieux's taking possession of his home.

The hearing took place over a two day period. During the interval between the hearing dates, the Ontario New Home Warranty Program reversed its decision with respect to the claim on the roof. It decided that the claim was warrantable and proceeded to the replacement of the roof. This left three claims for the Tribunal to decide:

1. Were the thermal windows of proper quality and properly installed?
2. Was the cement in the basement properly laid?
3. Was the kitchen floor sufficiently level?

Mr. Cadieux was the first to testify. It is to be noted that he presented no expert testimony with respect to any of his claims.

He stated that wind penetrated the windows of his home and that flies also were able to come through the windows. He based this on the fact that dead flies were found within the window rims.

He testified that the cement was deteriorating in the basement. It contained eleven cracks and the cement itself crumbled. He received an estimate that it would cost \$13,500 to replace the cement in the foundation. The cracks themselves began appearing in March 1988, after he took possession of the home.

Finally, he testified that the floor to the kitchen was crooked and despite repeated requests for repairs, they were never carried out.

In cross-examination, Mr. Cadieux stated that he kept wood in the basement for heating the house.

The next witness to testify was Roger Cadieux, the brother of Mr. Cadieux. He stated that he had visited the home some twelve times and saw cracks in the basement walls in the fall of 1987. With respect to the windows, he noted that the plastic tracks tended to contract and expand, and he saw dead flies between the windows. Finally, he noticed cracks in the cement foundation.

The first witness to testify for the defence was Paul Picard, an employee of the Ontario New Home Warranty Program. He went to visit Mr. Cadieux's home on four different occasions. He stated that the windows presented a problem to begin with, but that certain remedial actions were taken which made them function properly. He claimed that he could not see how flies could penetrate through the windows, given the repairs made, and speculated that the flies could be gaining access by the wood in the basement.

With respect to the kitchen floor, it had sloped excessively but was then repaired.

Finally, with respect to the cracks in the cement, they resulted from normal shrinkage and were, therefore, not covered by the Ontario New Home Warranties Plan Act.

He agreed at the end of the first day of hearing to have core samples taken in the concrete and to carry out repairs if such samples indicated repairs were necessary.

He said that the Program would also have one of the windows removed to make sure that it was properly installed and was not the cause of flies gaining access to the home. The kitchen floor would also be checked one more time and all results of the various tests would be presented to this Tribunal.

The case was suspended sine die at that point and re-scheduled for hearing June 11, 1990. On that date, Mr. Heinz Keller was the first witness presented by the Ontario New Home Warranty Program. He stated that he was a structural engineer who specialized in post construction building problem solving. He has often had the occasion to check concrete.

He testified that he went to visit the Cadieux home on July 10, 1989. He tested the concrete strength and found that it had a strength of 1,500 psi which was far below the level set by the Building Code of 2,200 psi. The concrete itself had a sandy appearance and was easily scratched. One could also drive a nail into the concrete which indicated that it was not of proper quality. He saw many hairline cracks. His conclusion was that the concrete had a very high water to cement ratio which caused shrinkage cracks.

Despite these problems, he was not of the opinion that the structural integrity had been impaired in the foundation walls. He felt that the cement was strong enough to support the building and that all problems could be solved by installing a membrane; the membrane would waterproof the foundation.

When asked about the problem with the flies in the home, he testified that he noticed that the wood frame of the door had gaps which were wide enough to allow flies to easily penetrate.

He also stated that he did not believe the footings to the home were four feet below grade despite the requirements of the Building Code. If this were the case, frost could cause damages to the foundation. It is to be noted, however, that Mr. Cadieux made no claims with respect to the footings and, therefore, this Tribunal has no authority to consider this problem.

Finally, Mr. Keller testified that he could see no structural defects at this time and would not expect any structural defects to occur if the repairs he suggested were carried out. He pointed out to the Tribunal, that in the contract with the builder, Mr. Cadieux himself had undertaken to do the parging in the basement, as well as the insulation of the basement.

The next witness, Alain Menard, was employed by Supervision Windows, in charge of the service department. He went



to inspect Mr. Cadieux's home July 10, 1989, to verify the installation of the windows. Mr. Cadieux was present. He testified that he removed part of the interior siding below the window to see if there were gaps. He saw no gaps under the cladding. Mr. Menard produced an extensive report as Exhibit 21. This report concludes that the windows were properly installed and would not permit flies to penetrate the home through the windows.

He testified that he saw flies at the time of his visit, but they were in a very advanced stage of decomposition. He saw no live flies or newly dead ones. He believed that no flies could come through the windows because there were no longer any gaps in the windows.

He believed the flies could come from the wood stacks in the basement where fly eggs could grow. These flies would then be attracted to the windows because of the light coming through them.

The windows themselves did not let in excessive air; the quality of installation was well within the CMHC standards.

Mr. Paul Picard then testified again on behalf of the Ontario New Home Warranty Program. He stated that he visited Mr. Cadieux's home in July 1989.

He testified that he inspected the windows and that they were in proper condition and not defective in quality or workmanship. He did not believe that insects could penetrate through the windows. While he acknowledged seeing flies in the home, he stated that Mr. Cadieux had not established how the flies entered.

As to the kitchen floor, he found that it still had a one-quarter inch slope over a twelve foot length after certain repairs were carried out by the builder. This amount of slope falls within the requirements of the Building Code.

With respect to the basement, he stated that the Ontario New Home Warranty Program was prepared to provide a water membrane to satisfy the suggestions of the report prepared by Mr. Keller.

Finally, Mr. Cadieux himself testified that it was he who had applied and received a Building Permit and that he had never arranged for an inspector to come to the home to check the footings to the house or that it was being constructed in a way which satisfied the Building Code. As holder of the Building Permit, this was clearly his responsibility.



On the basis of the evidence, the Tribunal renders judgment as follows with respect to the three items of claim:

1. The foundation.

Mr. Cadieux presented no experts to testify with respect to the foundation. The Ontario New Home Warranty Program, however, did present experts who had carried out inspections and testing, and were credible. They have established that the foundation itself contains no major defect and that some of the problems may actually have occurred because of construction work which Mr. Cadieux himself was supposed to do. The Ontario New Home Warranty Program has agreed to provide a membrane to prevent water penetration and the Tribunal directs the Ontario New Home Warranty Program to so do. Should the parties agree, the Ontario New Home Warranty Program may offer Mr. Cadieux a cash settlement in lieu of performing the work.

2. Defective windows.

Mr. Cadieux presented no expert evidence to establish that the windows contained defects. On the other hand, the Ontario New Home Warranty Program presented a credible expert whose findings establish that the windows do not contain defects in workmanship or installation. While there may be a problem with flies in the home, Mr. Cadieux has failed to establish the cause of the problem. The Tribunal is satisfied from the evidence that the windows are not the cause of the problem. For this reason, the Tribunal rejects the claim of Mr. Cadieux with respect to the windows.

3. Slope in kitchen floor.

The proof presented to the Mr. Cadieux was that the slope falls within acceptable limits and Mr. Cadieux has failed to establish that the slope exceeds such limits. For this reason, the Tribunal rejects the claim of Mr. Cadieux with respect to the kitchen floor.

The Tribunal notes that the delays for making a claim based on structural defects have not expired. For this reason, Mr. Cadieux might find it worthwhile to have his home inspected by an expert to determine whether there are any structural defects.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to allow claim No. 1 as set out above and disallow the remaining two items.

CANARIO DESIGN AND DEVELOPMENT INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REVOKE THE REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
WILLIAM WATSON, Member

APPEARANCES:  
WILLIAM H. STEELE, representing the Applicant  
(then withdrew)

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF HEARING: 14 November 1990 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing pursuant to Section 9(4) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350 (the "Act") to determine whether the Proposal of the Registrar to revoke the registration of Canario Design and Development Inc. under the Act, should be carried out.

A hearing in this matter was first scheduled for the 24th day of October, 1989, and was postponed on at least four occasions in order to allow Canario Design and Development Inc. to have an opportunity to prepare fully for the hearing and be represented by a solicitor of its choice. At the hearing today, Mr. William H. Steele appeared on behalf of Canario Design and Development Inc. and advised the Tribunal that he had been unable to get instructions from his client, both with respect to settlement discussions that had taken place between Mr. Steele and counsel for the Program on or about November 9, 1990, and in respect to the hearing itself.

Mr. Steele requested an adjournment of the hearing, and this request was refused by the Tribunal. Mr. Steele then advised the Tribunal that he would no longer be representing Canario Design and Development Inc. and filed affidavit material indicating his reasons, and the Tribunal excused Mr. Steele from the remainder of the hearing. The hearing then proceeded in the absence of any representative of Canario Design and Development Inc.

The Notice of Proposal dated April 26, 1989, indicates that the reasons for the Registrar's Proposal to revoke the registration of this builder are as follows:

1. The past conduct of Mr. Bernie Schwarzer, an officer of Canario Design & Development Inc. affords reasonable grounds for belief that the registrant's undertakings will not be carried out in accordance with law and with integrity and honesty, TO WIT:

As a director/officer of Canario Development Corporation Mr. Schwarzer permitted that company to violate its statutory obligations which led to the Ontario New Home Warranty Program having to pay out of its Guarantee Fund the total sum of \$49,910.00 for warranted repairs. This all being contrary to the provisions of Section 9(4) subsection (2) of the Vendor/Builder Agreement executed by the above company.

The Tribunal heard evidence that Mr. Bernie Schwarzer was also an officer of Canario Development Corporation, the latter being a builder previously registered under the Act. Canario Development Corporation was the builder of a condominium project at 162 Reynolds Street in Oakville, Ontario.

The Tribunal heard the evidence of Mr. Peter Walker, the Manager of Condominiums of the Ontario New Home Warranty Program, Mr. Roger Adams, the conciliator who was assigned to the conciliation for 162 Reynolds Street, Oakville, Ontario, Mr. Jim Campbell, President and owner of Daybue Contracting, an independent contracting firm from which the Program obtained an opinion, and Mr. John Dawson, the former President of the condominium corporation, now registered as Halton Condominium Corporation #144.

The Tribunal was satisfied after hearing the evidence of these witnesses that the condominium building in question had numerous construction deficiencies which the builder of the project either refused to correct, or failed to properly repair. These deficiencies included deficiencies in respect to the roofing, the asphalt paving in the parking area, the installation of the rear entrance door, the sidewalk and driveway, the garage door/solarium area, the garbage unloading area, brick dislocation above the garage door, and other miscellaneous deficiencies all of which are set forth in the Proof of Claim filed by Halton Condominium Corporation #144 within the first year warranty period, and

confirmed by the Program in its conciliation reports and other correspondence, and by the direct evidence that was heard by the Tribunal.

The Tribunal is satisfied that the condominium corporation provided the Program with proper quotations for the repair of the work, the reasonableness of which was assessed not only by the Program itself but by Mr. Campbell, resulting in the Program's decision to offer the condominium corporation a cash settlement in the sum of \$43,400 in respect of all the deficiencies. The Tribunal is further satisfied that the offer of settlement was made to the condominium corporation after appropriate efforts had been made to persuade the builder to fulfil his obligations to carry out the repair work.

The Tribunal is also satisfied that Canario Development Corporation was invoiced by the Program for the amount paid to the condominium corporation as a full and final settlement of all its claims under the warranties provided for in the Act, and furthermore, that Canario Development Corporation has failed to make any payment to the Program in respect of that invoice.

Finally, the Tribunal is satisfied that Mr. Bernie Schwarzer, the officer and director of Canario Development Corporation, is also an officer and controlling principal of Canario Design and Development Inc.

In conclusion, we find that the past conduct of Mr. Bernie G. Schwarzer in his capacity as an officer of Canario Development Corporation, affords reasonable grounds for the belief that Canario Design and Development Inc. will not carry out its undertakings in accordance with law and with integrity and honesty.

Accordingly, by virtue of the authority granted to this Tribunal under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal.

MR. AND MRS. DOMINICO CAPPELLETTI

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
LOUIS A. RICE, Member

APPEARANCES:  
DANIEL CAPPELLETTI, appearing on their behalf  
  
STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 2 August 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program, rendered December 5, 1989 to disallow certain claims by Mr. and Mrs. Dominico Cappelletti. The claims were with respect to defects in his new home, the whole in breach of Section 13(1) of the Ontario New Home Warranties Plan Act.

The New Home Warranty Program rejected the claims stating there were no defects in material and that the home was constructed in a workmanlike manner.

Since the Applicant spoke no English, his son Daniel appeared and testified on his behalf. It is to be noted at the outset, however, that Daniel Cappelletti at all material times lived in the home and saw first-hand the matters on which he gave evidence.

He stated that his parents bought the home from Celac Custom Homes on August 22, 1986 for \$139,000.00 and that they took possession of the home between August 15-22, 1986. The Certificate of Possession filed with the New Home Warranty Program indicates that possession was taken August 22, 1986.

He produced as Exhibit 3 a summary of the outstanding claims against the New Home Warranty Program. This list contains fourteen items.



The Tribunal shall consider each item separately, setting out the testimony of the witnesses with respect to that item and rendering its judgement thereon.

Item 1 - Side and front doors do not close properly.

Mr. Cappelletti testified that he noticed in the first thirty days that the side and front doors did not close properly. He observed large gaps in between the door and the trim and that the side door was not level. Air came in. The gap, he estimated, was 4 mm. Mr. Cappelletti said that the builder tried to repair the problems many times, but without success.

In cross-examination, he stated that the major problem was with the side door.

Mr. Andy Richter, Senior Conciliator with the New Home Warranty Program, testified that the gaps in the doors could not be made any smaller without impinging on the operation of the doors. He stated that he could not see daylight through the gaps.

Mr. Mark Roccatagliata, a conciliator with the New Home Warranty Program, testified that he found the doors operated properly.

On the evidence presented, the Tribunal finds that the Applicant has proved the existence of defects in workmanship with respect to the doors. The Tribunal, therefore, orders the New Home Warranty Program to carry out the required repairs with respect to the doors to eliminate the drafts.

Items 2, 3, 4, 5, 6 - Windows.

The Applicant had a general complaint with respect of the windows in the basement, dining-room, living-room, family room and kitchen.

He testified that in the case of the windows in the basement he could see water forming at the top of the windows. He has put in some trimming which may solve the problem, but will not know until next winter. He stated that the windows in the basement did not line up exactly. As to the windows in the dining-room, he stated that they did not close evenly and that water penetrated when they washed the window from the outside. The windows also allowed drafts to penetrate. He stated that water penetrated only



when it was washed with a hose which hurled the water with a certain degree of pressure against the window panes all over the home. During conditions of rain and snow, there had never been any water penetration in any of the windows.

The same complaint of water penetration under pressure from a hose was made with respect to the windows in the living-room, family room and dining-room. Finally with respect to the kitchen window, he finds it hard to close.

Mr. Richter testified that he could see no defects with respect to any of the windows and that they all functioned properly. Mr. Roccatagliata testified that while there was a water problem at the beginning, after the builder recaulked the windows in November 1988, there was no further water penetration.

Mr. Richard Parker, Assistant-Manager of the Hamilton office, visited the home and noticed condensation on the windows. He stated that opening the windows would solve the problem of condensation immediately.

Mr. Bill Verschoor testified that he was an employee of Dashwood which installed the windows in the Cappelletti's home. He checked the windows in January 1990 and found that they were of good quality. They were not a luxury window. He spoke to Cappelletti about the alleged problems and, upon verifying, could see no problems. He stated that if one put a hose to the window, it would leak but that this was an abnormal circumstance for which the window was not designed. Under normal circumstances of rain and snow, there was no complaint of any leak.

He went on to state that the windows met the requirements of the Code, and that he noticed no drafts coming through the windows.

The Tribunal finds that, on the evidence presented, the Applicant has not proved the existence of any defect with respect to the windows or the workmanship in installing them. The fact that the windows may permit water to enter under pressure of the hose is not indicative of a defect. If there were water penetration during a rainfall or snow storm, it would be a different matter since windows are designed specifically to prevent such penetration.

The evidence by all the parties is that no such leakage occurs and therefore the claim of the Applicant must fail.

The Tribunal, therefore, directs the New Home Warranty Program to disallow the claim with respect to Items 2 to 6.

Item 7 - Sliding door is rusting.

Mr. Cappelletti testified that he noticed the rust problem during the first year, but that the rust is minor. He said that he was not very concerned about the rust and that it could be scraped off.

In cross-examination, he admitted that the New Home Warranty Program was not informed of this problem in writing within the first year of possession being taken. The Tribunal explained to him that the claim, therefore, could not be sustained since it had not been made within the proper delay.

The Tribunal, therefore, confirms the decision of the program to disallow the claim.

Items 8 and 11 - Hardwood floors.

Mr. Cappelletti testified that the hardwood floors in the living-room and master bedroom were cupping and that this indicated poor workmanship. He stated that the cupping took place where the planks joined and that he noticed the cupping within the first year. The floor in the living-room was also uneven and there were unacceptable gaps between the joints. Some gaps were as much as 1 mm.

In response to a question, he stated that the floors were never washed. As to the living-room, he stated that there was a 1/2" differential in the level at the corner of the room and that he, therefore, had to put an object under the dresser to make it level.

In cross-examination, he testified that the cupping had become progressively worse since 1987 and that the gaps varied from 1/2 to 1 mm. As to the appearance, he said that it did not look like a hardwood floor but rather more like a "wave pool".

He also stated that he did not inform the New Home Warranty Program about the floors not being level in the living-room within one year of taking possession of the home. The Tribunal explained to him that that aspect of the claim was, therefore, not presented within the required delays and could not be sustained.

Mr. Richter testified that he saw nothing unusual in the floors and that they seemed satisfactory. He noticed no cupping in 1987 and saw it for the first time in January 1990 in several places. It was most evident in the living-room and master bedroom.

He states that he would have seen it in 1987 if it were in existence.

In this connection, Mr. Richter was referred to the letter of Richard Parker, Assistant-Manager of the Ontario New Home Warranty Program dated December 5, 1989 in which the Program made clear reference to cupping which was seen on visits on September 14, 1987, July 7, 1988 and September 9, 1989. In view of the letter, the Tribunal could only conclude that Mr. Richter may not have seen the cupping because his presence on the premises at that time was not for that purpose.

It is to be noted that apart from the letter which specifically refers to the cupping, Mr. Mark Roccatagliata stated that he saw cupping on his visit in July 1988 and that he noticed even more cupping on his visit in January 1989.

Mr. Richard Parker testified that on his visits in January and September 1989, he noticed very minor cupping all through the house. It was worst in the living-room. He found no defects and felt that the cupping could be explained by high humidity. Finally, he stated that he would have recommended that the New Home Warranty Program warrant the cupping if it had been proved to exist at the time that the Applicants moved into their home.

The New Home Warranty Program suggested that the cupping could have been caused because of condensation. It stated that laundry was hung in the basement and this might cause excessive humidity which might even reach up to the second storey. It also mentioned that plants in certain areas of the home could contribute to a humidity problem.

The Tribunal is satisfied that the floors contain a cupping problem and that the Applicants have, therefore, proved a defect in either the construction or the material of the floors. Having proved the existence of the defects, the burden of proof shifts to the Ontario New Home Warranty Program to prove that the defects are not subject to warranty because of the exclusions in Section 13(2) of the New Home Warranty Act.

The Tribunal finds that the New Home Warranty Program has failed to discharge this burden. It has suggested possible reasons for the cupping, but has not, on a balance of probabilities, shown that any of the reasons proposed is the cause of the problem. The Program did not present credible expert testimony that would establish the problem was caused by excessive humidity.

On the contrary, the evidence established that cupping

should not occur so soon after delivery of the home. The existence of such cupping in floors that were never washed and were apparently well maintained, leads to the presumption of the existence of a defect in the materials or the workmanship based on the principle of *res ipsa loquitur* - floors should not manifest cupping.

The Tribunal, therefore, directs the New Home Warranty Program to repair the cupping in the floors in such a manner as to return them to the state they should have been in in a newly constructed home.

Item 9 - Stain on kitchen ceiling.

Mr. Cappelletti testified that the kitchen ceiling was stained because of water damage when the attic was leaking. The leak in the attic was corrected, but only the stained part of the ceiling was repainted. Mr. Cappelletti is asking that the whole ceiling be repainted so that it be one uniform colour.

Mr. Richter stated that he noticed some discolouring but that it was acceptable. Mr. Roccatagliata testified that the stain was visible, but the discolouration was acceptable.

The Tribunal finds that the Applicant has established his claim. In carrying out the repainting necessitated by the water damage, the whole of the ceiling should have been painted rather than just the portion that contained the stain. The New Home Warranty Program is, therefore, directed to repaint the entire ceiling with one layer of paint.

Item 10 - Oak stairs contain dents.

Mr. Cappelletti testified that there were a certain number of small dents on the steps. He also found the finishing of the stairs was not to his satisfaction.

Mr. Richter testified that he examined the steps and found them to be in acceptable condition. He noticed no dents. In the written complaint by the Cappellettis, there was no mention of dents in the steps.

The Tribunal finds that the Applicant has not proved the existence of defective workmanship or defects in materials with respect to the oak steps. The burden of proof was on the Applicant to do so and his claim must, therefore, be rejected.

Item 12 - Leaky skylight.

Mr. Cappelletti testified that the skylight developed condensation even though it is double-glassed which resulted in the drywall turning black and forming fungus.

Mr. Richter testified that there was no defect in the skylight. Proper maintenance by the homeowner involving controlling the moisture would solve the problem.

The Tribunal finds that the Applicant, who had the burden of proof in establishing a defect, has not discharged that burden. His claim, therefore, is rejected.

Item 13 - Insulation in attic.

Mr. Cappelletti testified that he believed the insulation in the attic had been damaged by the leak in the roof. The insulation has contracted and compacted and he can now see 2" X 4" studs. Originally the insulation was anywhere from 8-12" deep.

Mr. Richter stated that he saw no insulation problem. He testified that the insulation should be a uniform 9" deep and did not believe that the wetness from the water leak would cause insulation to compact as much as it had.

The Tribunal finds that the Applicant has established the existence of a defect with respect to the insulation resulting from the leakage of water through the roof. As a result, the Tribunal orders the New Home Warranty Program to carry out repairs on the insulation so that it has a uniform depth of 9" throughout the attic.

Item 14 - Chimney problem.

In cross-examination the Applicant admitted that he first complained of this problem in July 1990, almost three years after the warranty period had expired, this being a non-major structural defect claim. For that reason the Tribunal rejects the claim by the Applicant.

Accordingly, by virtue of the authority invested in it under 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claims with respect to Item 1, 8 and 11, 9, 13, and to disallow the other claims.



MR. AND MRS. FRED CAPUTO

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
BARBARA NICHOLS, Member  
R. MARTIN, Member

APPEARANCES: EIJA PELTOKANGAS, representing the Applicant  
NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF HEARING: 29, 30 March 1990 Thunder Bay

REASONS FOR DECISION AND ORDER

Fred and Gilda Caputo purchased 185 Market Street, Thunder Bay in September 1988. They were the second owners of the home which had been built in September or October 1987 and had been occupied by the previous owner. It appears the Caputos experienced no problems with water coming into the basement until March 1989 when they wrote to the Ontario New Home Warranty Program as follows:

March 28, 1989

Ontario New Home Warranty Program  
91 S. Cumberland St.  
Suite 215  
Thunder Bay, Ont.

Attention of: Mr. Nick Plichta  
Refer to: #R060224H002928  
Possession Date - May 7, 1987

Dear Sir:

I would like to bring to your attention the fact that there is a considerable amount of water coming into my basement.



Would you be so kind as to contact me in this matter.

Thank you.

"Gilda Caputo"  
xG. Caputo  
Mr. Fred Caputo  
185 Market St.  
Thunder Bay  
Phone 768-0684

The Program replied the following day to the effect that the builder had been advised to investigate the complaint. Subsequently, on April 24, the Program advised Caputo that the Conciliation officer, Nicholas Plichta, would attend at the premises on May 5 to discuss the matter. This was followed by a letter from the Program to the builder containing the following recommendations:

May 8, 1989

686835 Ontario Inc.,  
Lormar Construction,  
R.R. #17, 160 Viny Street,  
Thunder Bay, Ontario.  
P7B 5E3

Subject: Conciliation Report  
Ref. 06-224 #2928

Dear Mr. Michieli:

Following a conciliation inspection and meeting at the Caputo residence on May 5, 1989, we would like to record the following comments.

After careful examination, it was evident that the water leaking into the basement was attributed to the improper function of the weeping tile. The builder agreed to examine the sump pump to ensure proper operation in order to lower the water level in the sump pit. This should provide a control of the water being brought into the sump pit.

It was also noted that the exterior grades immediately around the perimeter of the house are very low and may well be contributing to discharging much of the surface drainage into the weeping tile. This, along with the fact that some of the roof downspouts have to be revamped, a very conscious effort must be made to create a positive slope for surface and roof water drainage to be carried away from the home.

We recognize that these repairs are regarded as seasonal in nature and should be addressed once weather permits. Should you fail to respond favourably to this notice by June 15, 1989 however, we will have no alternative but to deal directly with the homeowner and forward all related costs pertaining to the repairs to you for reimbursement.

Should you have any questions relative to the above, please do (sic) not hesitate to contact this office. We ask that you conduct yourself accordingly.

Yours truly

"N.M. Plichta"  
N.M. Plichta  
Regional Manager  
NMP/dm  
cc Mr. Caputo

Although the builder had attended at the premises, it appears that as a result of differences with Caputo he eventually gave up and the Program engaged a Mr. Marsico who operated a company known as P. Marsico Enterprises Inc. to perform certain work and resolve the problem.

Marsico, with the use of a back hoe, dug around the south and west side of the house, the latter being the back of the property. He also dug about a foot or so on the north side and investigated the condition of the weeping tile which he had uncovered. In his evidence, Marsico said he found the weeping tile on the southwest and northwest corners a little higher than in the middle. There was also a sump pump on the south wall to which were

connected two lead-in pipes from the east and west, although only the latter lead carried water.

When he had completed his work, Marsico apparently wished to continue digging along the north side of the house, but the Program did not agree to any further excavation.

Once the work was done, however, it appears that 80% of the problem had been resolved. Nevertheless, there is no doubt that some water continued to come into the basement afterward since in the fall of 1989, there was evidence of some water penetration into the basement.

The Program, however, took the position that since the neighbouring property was on an elevation of at least 2' higher than that of the Caputo's, the water was being directed to the Caputo's north wall.

In the meantime, since a swale which ran across the rear of the Caputo yard had been blocked by a garden planted by Caputo, the Program sloped the bank grading away from the house to prevent the flow of any excess water from the swale. The Program further changed the downspouts from the back of the Caputo house to the front directing the drainage from the eaves to the street.

The Program was now under the impression that the work it had employed Mr. Marsico to do, the sloping of the rear yard away from the house and the change in the downspouts may have resolved the problem. It was considered any further difficulties with water arose not from faulty workmanship or installation, but from the neighbour's property to the north and on receipt of further complaints from Mr. Caputo, Mr. Plichta, Regional Manager of the Program, wrote to Caputo on September 29, 1989 as follows:

September 29, 1989

Mr. Fred Caputo,  
185 Market Street,  
Thunder Bay, Ontario.

Subject: Leaking Basement  
Ref. 06-224 #2928

Dear Mr. Caputo:

With respect to a very long telephone conversation with your son-in-law, Mr. Scarcello, it would appear that in spite

of the additional investigation and repairs that were carried out by the Warranty Program and in addition to what your builder had undertaken previously, we understand that you are still experiencing evidence of some leaking at the northwest corner of your basement and some areas along the north wall.

As explained to Mr. Scarcello, we have virtually investigated every possible aspect which normally could develop into a leaking basement problem and we can not find any fault in the installation or workmanship that was originally provided by your builder. In short, we have excavated and made some minimal repairs at the front and rear of the house, inspected the weeping tile system to insure proper operation, insured the operation of the sump pump discharge, raised the grades complete with window wells at the rear of the property, relocated the location of your downspout to the front of the home, all at no cost to you the homeowner. Having undertaken all this work in mid July and not hearing further from you, we were of the opinion that the problem may have been solved, only to learn from my telephone conversation with Mr. Scarcello September 27, 1989, that there still appears to be a problem at the northwest corner and along a portion of the north wall.

Practically at the outset of our involvement to resolve this problem, as early as May of 1989, we continued to express a sincere concern in the manner in which you neighbour to the north is dealing with his surface drainage and more importantly in the manner he has chosen to deal with his roof water discharge. Not only is this property some two feet higher in elevation, he has also elected to bury three roof water leaders which collect the entire roof surface drainage, into what appears to be a weeping tile system along the property line and only some four to

five feet away from the north elevation of your house.

Further, immediately to the rear of your residence and with reference to a subdivision agreement, there is to be a clearly defined and maintained swale to control all the surface drainage of the properties to the west of your residence which is considerably higher than your property. In our opinion, this swale is not proper and is surely suspect in not performing the purpose for which it was intended.

We appreciate that you have elected to contact our local M.P.P., Mr. Taras Kozyra and seek the advice of your solicitor, Mr. Capello, and more recently have even engaged the services of a consulting engineer in an attempt to determine the continuing problem you have with some minor leaking in your basement. We honestly do not understand why you continue to ignore at least the two potential problem areas at the rear and to the north of your home and keep insisting that the problem has to do with faulty workmanship by your builder, Michieli Brothers. We can not help but acknowledge, for the record, your personal feelings and confrontations you have had with your builder and suspect that possibly this is having a very large effect in our joint approach in trying to solve the problem.

Having discussed this matter with your builder and again, in addition to what he had done for you, this office has expended a considerable amount of energy and cost in responding to your concerns to no avail. We do take some exception to Mr. Scarcello's remarks that we have dragged our feet in our efforts. This is somewhat unfair since our records show that we were very prompt in not only getting your builder on site but also in our follow up after your lines of communication with him broke down. Another point worth mentioning

at this time as well, is that we have always responded to your numerous verbal complaints and to those of Mr. & Mrs. Scarcello without any written correspondence from you for our files. Possibly this level of cooperation on our part further demonstrates the level of effort we have put forth ever since your original complaint to this office dated March 28, 1989. Having no other alternative, we hereby grant you the right to appeal this entire situation to the Commercial Registration Appeal Tribunal.

#### APPEAL PROCEDURE

The Ontario New Home Warranties Plan Act provides you with a right of an appeal before the Commercial Registration Appeal Tribunal, if you mail or deliver, within fifteen (15) days after this notice is served on you, notice in writing requesting a hearing to the Corporation, (Ontario New Home Warranty Program, 5160 Yonge St., 6th Floor, North York, Ontario. M2N 6L9) AND the Commercial Registration Appeal Tribunal (1 St. Clair Avenue West, 10th Floor, Toronto, Ontario, M4V 1K6).

If during or after you have undertaken any investigation or preparation pursuant (sic) to your hearing, we would still be interested in seeing the results of what you feel is the underlying problem and if we can be of any further assistance you are asked to contact this office at your earliest convenience.

Yours truly

"N.M. Plichta"  
N.M. Plichta  
Regional Manager

NMP/dm

cc Lillian Esarik  
Mike Capello



It is from this decision that Mr. and Mrs. Caputo now appeal.

Counsel for both parties in their written argument agree that there are three issues to be considered by this Tribunal:

- 1) Do the appellants have water penetration into the basement of their residence at 185 Market Street, Thunder Bay?
- 2) What causes the water penetration in the basement?
- 3) How much are the appellants entitled to recover?

After the work was completed by Mr. Marsico, Mr. Plichta wrote to him on July 19, 1989 the following:

.....

We should mention that the majority of the work we had undertaken was based on your statement which suggests that you were confident of what the problem was and in an overall attempt to resolve this situation we had merely authorized this work. Granted, the eavestroughing has not been relocated to date, we should report to you that the Caputos had notified this office that the basement leaked again after two severe rainstorms just prior to and including the weekend.

Notwithstanding, we are still confident that the investigation and the nature of the repairs we had undertaken are satisfactory and there would appear to be very little else we can do to completely alleviate this problem. We will be contacting the Building Services Department of the City in expressing our concern of some anomalies that exist in the development of the adjoining properties which we feel are seriously having an adverse effect in trying to control the Caputo's basement leaking problem. More specifically, the site drainage pattern which exists at the rear of the property and three questionable buried downspouts

in evidence from the adjoining property and pointing directly towards the Caputo's property.

We must go on record in pointing out the need for the homeowners to initiate some immediate attempts to ventilate their basement in addition to removing the somewhat poorly constructed wooden sub-floor which we understand was installed by the homeowner. We would also like to draw your attention and ask that you convey to the homeowners that their process of compacting the backfill material around the dwelling should be done by proper compaction and we certainly do not recommend extensive watering to achieve this goal.

A Mr. P. Scarcello, who had sold the house to Caputo, attended in the fall of 1989 after the work was done and noted some water, not much, on the north side of the wall coming in and extending some 5" from the wall. He said he called Mr. Plichta who said it was coming from the neighbour's property to the north. Caputo had installed a wooden sub-floor which had become damp at that corner.

A Mr. McKay, general engineering consultant with the City of Thunder Bay, testified on his findings after attendance at the property. He said the northwest corner of the basement where the floor met the wall showed dampness, but there was no water in the sump. Two days before, he had noticed "the sump was bone dry, but the northwest wall was wet looking and there was dampness on the wood". In his opinion, the weeping tile was not taking water out of the ground and into the sump. He further testified that, in his opinion, the swale was not the cause of the problem nor the combination of the swale and the adjoining residence.

Two photographs tendered in evidence (Exhibits 11 and 12) taken by Caputo on February 22, 1990, show unmistakable signs of water or dampness on a small area of the floor near the wall. The answer to Question #1 is therefore 'yes'; there is some penetration of water even though it may be slight.

The question then is where is the water coming from and is it the result of faulty installation of the weeping tile?

We have the evidence of Mr. McKay who had spent one-half hour at the property and was of the opinion, that neither the swale nor the adjoining property was the cause but on the other hand, the weeping tile was not taking the water out of the ground. There was, however, no blockage of the tile when it was flushed on the recommendation of the Program's contractor Mr. Marsico. He also testified that two coats of water-proofing tar were applied and the coating on the foundation was very good.

Since, however, a further complaint had been received after the work performed by Mr. Marsico, Mr. Plichta, Regional Manager for the Program, sent the following letter to the City of Thunder Bay reflecting his opinion of the cause of the problem:

July 19, 1989

City of Thunder Bay,  
Building Services Branch,  
500 E. Donald Street,  
Thunder Bay, Ontario.  
P7E 5V3

Attention: Gord Cuthbertson, P.Eng.

Subject: Caputo Residence  
185 Market Street, Thunder Bay

Dear Gord:

In the event you are not aware, the original builder, Michieli Bros., and ourselves have recently carried out some repairs and an extensive investigation to not only check the basement leaking problem at this residence, but to determine the source of the problem as well.

Having carried out virtually every conceivable aspect of what could normally be attributed to a leaky basement problem, we would like to express a concern we have with respect to the adjoining properties that we feel are contributing to this immediate problem.

For example, property immediately adjacent to the Caputo residence along Market St. has been elevated with its finished grade by some 2 feet higher than the Caputo

residence. Further there are 3 downspouts pointing towards the Caputo residence that are presently discharging into sections of weeping tile buried and pointing in the direction of the Caputo property. The properties immediately to the rear of 185 Market Street are also much higher and sloped towards the rear of the Caputo residence. There is some evidence of some form of swale along the easement which should be directing the surface drainage to the south but we see very little evidence of any attempts made to the proper development of this swale or the maintenance necessary to control surface drainage.

With reference to the existence of a sub division agreement and the Ontario Building Code reference to surface drainage and disposal (Sec.9.14.5 & 6), we would like your assistance in trying to resolve this matter and would appreciate any advice you may have for us.

Yours truly  
"N.M. Plichta"  
N.M. Plichta  
Regional Manager  
NMP/dm  
cc Mr. Caputo

In his evidence, Mr. Plichta said that he had attended at the residence some fifteen times to address the complaint and it was his opinion, the source of the water was the adjoining property to the north. The Program, on his recommendation, had even installed a larger sump pump which was a submersible pump. He noted there was no infraction against the Building Code. Asked why so much water was getting into the weeping tile, Mr. Plichta gave a firm opinion that the elevation of the properties to the north and west, 2' and 9' respectively, were the cause. He pointed out that the swale was not adequate to carry the water from the hill 9' higher and that the house to the north had three downspouts draining from the roof toward the Caputo property. This water is carried away by a weeping tile instead of a solid pipe, and drains to a lower property despite a wooden retaining wall. Its drainage, however, is directed to the street at the front of the house.

To alleviate the flow from the swale, the Program had graded the Caputo property so that it sloped towards the hill.

Mr. Tony Olesky, an inspector with the Program, said that he had attended at the property on three or four occasions. He also testified that the swale was inadequate and that the Caputo garden had extended into the swale. Having inspected the downspouts on the house to the north, he was of the opinion the water could be coming from them. He said he found the weeping tile intact and working properly, and the fact that it was slightly higher to the top of the footings at the corners would make no difference to the flow. The tile was, however, lowered by the Program's contractor. His conclusion was that the weepers were clear, the tile was not obstructed and the walls bore no visible cracks. He remarked that he noticed a difference of 3 1/2' in elevation between the Caputo property and that lying to the north at a distance of 5'. With the three downspouts draining to the south, there was, in his opinion, little doubt that the source of the problem was water from them on to the Caputo land.

Caputo had written to the City of Thunder Bay on November 10, 1989 requesting copies of any correspondence it had on file from the previous owner complaining about water in the basement. It is to be noted that the previous owner had executed an affidavit or statutory declaration at the time of the sale to the effect that he had encountered no problems with water in the basement. The reply from the Department of Engineering, however, indicates the contrary since it refers to some correspondence from Wardrop Engineering which was dated September 17, 1987.

In his response, Mr. Wright refers to the possibility of inadequate weeping tile (emphasis is ours).

File: Belluz Subdivison  
Wellington Heights

November 10, 1989

Mr. F. Caputo  
185 Market Street  
Thunder Bay, Ontario  
P7B 5N1

Dear Mr. Caputo:

CAPUTO RESIDENCE - 185 MARKET STREET - THUNDER BAY  
WATER PROBLEMS

In response to your letter of October 18, 1989, it is our opinion that the water

problems in your basement along the north and west walls are a groundwater problem possibly complicated by inadequate weeping tile in this area.

We note from an inspection of your sump that there are only two (2) leads connecting your perimeter tile system to the sump. Neither of these leads extends in the direction of the north and west walls thereby causing a very long path for drainage to follow before it enters the sump. We also note from Mr. McKay's inspection of your basement that the frequency of operation of the sump pump is very low in relation to the amount of water which you claim has been entering your basement.

We have also conducted an inspection of the rear yard swale and feel that it is operating in a reasonable manner to pick up drainage from those lots to the rear of your property. We saw no evidence of water spilling over the swale and through your property.

Due to the nature of the terrain in this area and the presence of sub-surface rock it is possible that a localized groundwater problem can exist and the weeping tile system for the house should be designed accordingly.

We feel that the weeping tile system in your home should be again checked to ensure that water from the northwest corner is in fact being directed quickly enough to your sump. It may be necessary to install one (1) additional lead from the northwest corner to your sump pit.

Please find enclosed a copy of the correspondence which we have found during the review of our file. This letter from Wardrop Engineering was submitted to our office following surface water complaints on this property. It is our understanding that the surface water problems have been



corrected by the landscaping which was laid out by Wardrop Engineering in accordance with their letter.

Yours truly,

"R.H. Wright"  
R.H. Wright  
City Engineer

AMcK:li  
Encl.

In weighing the evidence in this matter and considering the extensive work undertaken by the Program to determine the cause of the water problem, we have no alternative but to disallow the claim.

No evidence has been adduced by the Applicant that the weeping tile is at fault beyond a possibility. That possibility, however, cannot satisfy the onus on the Applicant to prove faulty workmanship or installation and to bring himself within the provisions of the Ontario New Home Warranties Plan Act. Mr. Caputo may have a cause of action against his neighbour to the north for the excess water coming on to his property, but that is not within our province.

Section 13 of the Act provides as warranty that:

- (a) that the home
  - (i) is constructed in a workmanlike manner and is free from defects in material,
  - (ii) is fit for habitation, and
  - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations;

.....

We are unable to find any evidence that the home is not constructed in a workmanlike manner, nor is there evidence of defects in materials. It is clearly fit for habitation and there is no evidence of structural defect or infringement of the Building Code.

The answer to the second question, therefore, is that the evidence in the case of the water is coming from the adjoining property to the north and this is not a matter involving the Ontario New Home Warranty Program.

In view of this finding, it is unnecessary for us to address the third question except to point out that, in our view, the law is clear that this Tribunal has no jurisdiction to award costs in any event of the cause.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

JUDGE AND MRS. CHARLES

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL:

JAMES GRAY LESLIE, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member  
LOUIS A. RICE, Member

APPEARANCES:

CAROL A. STREET, representing the Ontario New  
Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 6 September 1990

DECISION AND ORDER

No one appearing for the Applicant and the Respondent appearing and ready to proceed, the Tribunal determines as follows:

1. The Applicant was sent by registered mail the Appointment for and Notice of Hearing the 27th day of June, 1990 as evidenced by Exhibit 2, which stated:

...hearing will be held...before the  
Commercial Registration Appeal  
Tribunal in the Tribunal's chambers,  
1 St. Clair Avenue West, Toronto on  
Thursday, the 6th day of September,  
1990 at 9:30 o'clock in the  
forenoon...

which contains the further notice:

...If you do not attend at the  
hearing, the Commercial Registration  
Appeal Tribunal may proceed in your  
absence and you will not be entitled  
to any further notice in the  
proceedings.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. ROBERT A. CLARK

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
LOUIS A. RICE, Member

APPEARANCES:

MR. AND MRS. ROBERT A. CLARK, appearing on their behalf

CAROL STREET, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 20 September 1990

Toronto

REASONS FOR DECISION AND ORDER

The Applicants requested this hearing to review the decision of the Ontario New Home Warranty Program disallowing their claim. The Program's decision, dated February 20, 1990, was that the concrete floor installation in the basement of the Applicants' home is acceptable and not covered by warranty. The Applicants' complaint is that the floor is not level and does not slope towards the floor drain.

The basement floor in question was initially inspected by two Program inspectors who measured it with a string line at the south room. Their report indicates that they concluded that the variances were not excessive. Subsequently a reinspection was carried out by Mr. Lorne Thurston. He too measured the south portion of the basement with a string line and found a variance of 1 1/2 inch on the east side, and 1 1/4 inch on the west side. In his testimony before the Tribunal, Mr. Thurston stated that keeping in mind that this was an unfinished basement area, he considered this degree of variation to be acceptable for the purpose it was designed for, namely, an unfinished storage area.

Mr. Clark, one of the Applicants, testified that he has been in the building industry himself for some thirty-one years. He produced at the hearing a grid of the basement setting forth measurements of variances taken by him over the entire basement

area. At the south end of the basement he measured variances of 2 1/8 inch in one corner and 2 1/2 inches in another corner and up to 2 inches along one wall. His measurements also demonstrate that the floor does not slope to the floor drain. When presented to Mr. Thurston, he indicated that he had no dispute with and accepted the accuracy of Mr. Clark's measurements.

The sole issue before the Tribunal was whether or not this was an acceptable level of variance. Mr. Clark contended that the variance should be no greater than plus or minus 1/4 inch. Mr. Thurston admitted that if this had been a finished area he would have applied a higher standard, closer to the one suggested by Mr. Clark.

The Applicants' agreement of purchase and sale was filed in evidence and the Tribunal's attention was drawn to the provision therein that "the purchaser wants basement left unfinished". However, Mr. Clark testified that it was his intention to finish the basement himself. He has already installed a number of partitions. He indicated that he has not proceeded further with work in the basement due to his apprehension that doing so would compromise his claim against the Program.

The Tribunal accepts the evidence of Mr. Clark that he has intended this area of the basement to be finished and used as "livable space" from the very beginning. The fact that the space is not finished at present should not be determinative of the standard to be applied. In order to finish the basement and make it a usable area, the floor will have to be levelled and sloped to the drain. As presently constructed, the basement floor does not meet the requisite standard of good workmanship warranted under the Act.

The Tribunal accordingly allows the claim and, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, directs the Program to repair the basement floor so that is level and slopes to the drain.



J.A. CONSITT

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding  
GORDON R. DRYDEN, Member  
JOHN HURLBURT, Member

APPEARANCES: J.A. CONSITT, appearing on his own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 25 October 1989

Toronto

REASONS FOR DECISION AND ORDER

This hearing was requested to review the decision of the Ontario New Home Warranty Program (the "Program") disallowing certain claims made by the Applicants pursuant to the Ontario New Home Warranties Plan Act (the "Act"). The Applicants became owners of the home in question on December 22, 1987.

1. Fireplace Construction

The first matter that is before the Tribunal relates to construction of the fireplace which the Applicants complain has "shortcomings in workmanship" and a "fire safety fault". The fireplace was first discussed by the Applicants and the Program's inspector, Mr. Hagen, in November 1988. Prior to that time, the Applicants had had fairly lengthy dealings with the Program in respect of numerous other deficiency claims including a conciliation inspection which took place in May of that year. The Applicants had become aware of a potential problem with the fireplace as the result of an attempt to have a fireplace insert installed by a third party. The third party was unable to carry out the installation of the insert and suggested to the Applicants that there was something wrong with the fireplace dimensions. The Applicants relayed this information to Mr. Hagen in a conversation that took place in November 1988. The evidence indicates that Mr. Hagen responded by advising Mr. Consitt to contact the City of Waterloo Building Inspection Department (since that department

would have been involved in inspecting and "passing" the fireplace), in order to arrange for a re-inspection by the City building inspector. Mr. Hagen asked Mr. Consitt to arrange for the City inspector to contact Mr. Hagen following the reinspection. Mr. Hagen did not advise the Applicants to submit a written claim in respect of the suspected fireplace construction deficiency, nor did he advise them to refrain from so doing, indeed the necessity of submitting a written claim was not even discussed. However, by advising the Applicants to have the City building inspector contact him, and by not mentioning the need to file a written claim, Mr. Hagen would have given the Applicants the impression that the procedure he had suggested was all that was required in order to pursue this claim with the Program.

The Applicants wrote to Mr. Hagen on February 6, 1989, in respect to a number of unresolved items. That letter also included the following paragraph:

With respect to the fireplace construction we have since had a visit by Mr. Trinkaus from the City of Waterloo together with Mr. Michael George of the Waterloo Fire Department. It would appear that some of our concerns were indeed justified and we understand that a report is being prepared by Mr. Trinkaus of which a copy will be forwarded to yourself.

This was the first time that the Applicants submitted a written notification to the Program in respect of the suspected fireplace construction deficiency. As counsel for the Program has pointed out, this letter was sent after the first year warranty period had expired.

Mr. Trinkaus sent his report, dated February 3, 1989, to Mr. Consitt with a copy to Mr. Hagen at the Program. The report states, in part, as follows:

#### RECOMMENDATIONS:

Although the fireplace installation complies with Ontario Building Code requirements, concern is expressed in particular about the almost non-existent smoke chamber and a very shallow smoke curtain (between the lintel and the bottom of the

damper). It is the combined shortcomings of good practice and workmanship which may cause the fireplace to "smoke".

The Applicants, who represented themselves, did not call Mr. Trinkaus as a witness. Counsel for the Program objected to admission of the Trinkaus report for the purpose of "proving the truth of its contents" since Mr. Trinkaus was not available for cross-examination; but agreed to and the Tribunal permitted the admission of the report for the limited purpose of proving what the City building inspector had reported to the Applicants and to the Program. It should be noted, however, that even if the Tribunal had accepted the statements in the Trinkaus report as true, except for the unequivocal statement in that report there has been compliance with The Ontario Building Code, the report goes no further than to indicate that there is a "concern" about certain components of the fireplace and a possibility that the fireplace may smoke.

The Applicants attempted to file a further one page report prepared by Mr. Henry Rasmussen. The Tribunal was not apprised of Mr. Rasmussen's qualifications. A copy of the report had not been provided to the Program's counsel before the hearing and Mr. Rasmussen was not present at the hearing and was, therefore, not available for cross-examination. Counsel for the Program objected to admission of the "Rasmussen" report for any purpose and the Tribunal did not allow it to be admitted.

The Applicants have never used the fireplace and therefore have no empirical evidence that the fireplace will "smoke". Mr. Consitt testified that the "backwalls (of the fireplace) are too deep", and "not sloped enough in the right direction". He stated that the fireplace is "not built to the proper measurements" and that the "damper is too low". Mr. Consitt was unable to state with any certainty what the actual fireplace dimensions were.

Mr. Hagen has been a Program inspector for 12 years and has worked in the construction industry since 1948. Mr. Hagen stated that he had not inspected the fireplace, but that he had reviewed the Trinkaus report and noted that the report indicates compliance with Ontario Building Code requirements. Based on his knowledge of fireplaces in general and on the statements contained in the Trinkaus report, Mr. Hagen found that he could not conclude that the fireplace as constructed poses a safety hazard, particularly, as no orders to comply had been issued by either the Waterloo Building Inspection Department or Fire Department. Mr. Hagen testified that fireplaces are unique and that fireplace

design an empirical process rather than a theoretical science. The Building Code requirements are not specific as to the measurements of various components. Mr. Hagen testified that, in his view, the fireplace would have to be empirically tested to determine whether or not it would function properly.

Based upon the limited evidence that was before the Tribunal and keeping in mind that the onus is on the Applicants to prove their claim on the balance of probabilities, the Tribunal is unable to find that the fireplace construction is defective or that any of the Section 13 warranties have been breached.

Having made this finding it is unnecessary to decide whether or not the Applicants claim would be barred due to the failure to provide written notification of the claim to the Program within the one year period. It is to be noted that the Program decision dated April 28, 1989, does not even raise this failure as a reason for disallowing the claim. While not deciding this point, the Tribunal would nonetheless comment that in circumstances such as these, where the Program was clearly aware of the claim prior to the end of the one year warranty period, and where the Program inspector gave advice to the Applicants as to how to proceed in pursuing the matter, but did not advise them to put the claim in writing before the fast approaching deadline, a strong estoppel argument could be made by the Applicants and would likely prevail.

Finally, it should be noted that in the event that the Applicants proceed to test the fireplace and are able to establish by concrete evidence that a fire hazard is created which affects the habitability of the dwelling, then the Applicants can go back to the Program with a major structural deficiency claim.

## 2. Lot Drainage and Grading

With respect to this matter the Applicants are looking to the Program for "costs" reimbursing the Applicants for the time and effort they expended in dealing with the Program and with the municipal authorities over a lengthy period in order to have the lot drainage and grading problems rectified. The rectification work was carried out by the City of Waterloo and has largely, but not completely, corrected the problems experienced by the Applicants.

As to the claim for costs, as indicated by this Tribunal in the case of Pomeroy 16 CRAT 173, the Tribunal has no jurisdiction to award costs and, accordingly, the Applicants' claim is disallowed.

3.        Garage Floor

Counsel for the Program advised the Tribunal that the Program had now agreed to replace the garage floor. Accordingly, the Tribunal does not have to deal with this item.

4.        Front Porch Post Removal Repair

This repair was adequately carried out by the Program in the Tribunal's view. The claim for further repair is therefore disallowed.



DOMINIC CORRADO

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
D.H. MACFARLANE, Member

APPEARANCES: SEAN L.K. DALEY, representing the Applicant

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF 5 October, 12 December 1989  
HEARING: 30 March, 3 April, 28 June 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered April 25, 1989 disallowing certain claims by Mr. and Mrs. Dominic Corrado arising from the construction of their home by Greenacre Estates. The claims are based on Section 13 and 14 of the New Home Warranties Plan Act and Section 6(7) and Section 20(1) of Regulation 726 under the Act.

The first witness, Mr. George Anthopoulos, Secretary-Treasurer of Greenacre Estates, testified that his company entered into a contract April 14, 1988, to construct a home designated the "Frederica" for \$343,900.

After signing the contract, the builder discovered that the "Frederica" model could not fit the lot on which it was to be built. He, therefore, held a meeting with the Corrados to explain the situation and admit that Greenacre could not satisfy the contract.

He proposed that the Corrados agree to purchase a different model called the "Anastasia", which would fit the lot.

The Corrados agreed and Schedule "B", dated August 9, 1988, was added to the original contract (Exhibit 6) in which the "Anastasia" was listed as the model to be built. Schedule "A"



listed the features that the home was to have. It is to be noted that these features, described as "Quality Features", are clearly enumerated.

Included in Schedule "B" were certain upgrades such as wonderboard in the bathrooms for \$550 extra, an additional drain in the basement for \$250, oil paint for \$400, sliding door off dinette for \$750, and an upgrade of vinyl windows for \$1,900.

An additional document entitled "Amendment to Agreement of Purchase and Sale", (Exhibit 7) signed in July 1988, obliged the vendor to extend the garage to 19'6", to widen the dinette to 11'6", to replace the door from the dinette to the deck by a window at the Vendor's expense, and to not provide a deck at the back of the home.

Therefore, by virtue of Schedule "B" and the amendment (Exhibit 7), all the terms for the construction of the home were set out.

As a matter of law, when was the contract of purchase entered into? On April 14, 1988 or in July, 1988? The New Home Warranty Program has argued that the amendment did not affect the purchase date of the contract. The Tribunal, however, believes that the contract of sale took place in July 1988 at the earliest.

The initial contract was for a specific model which the builder could not deliver. At that point, the purchaser could have withdrawn from the contract. Instead, through negotiation, a new contract was entered into in which both parties finally agreed to the model that was to be built and delivered. Substituting one model for another was such a great change, that it cannot be reasonably argued that it constituted a simple amendment, despite the document, Exhibit 7, being called an amendment.

From the facts of the case, it is clear that a new contract was entered into for the Anastasia in July 1988 and this is the date the Purchase Agreement was entered into for all legal purposes.

Mr. Anthopoulos testified that midway through the construction, Mr. Corrado told him he did not want a sliding door but rather a picture window. The builder agreed to do so.

With respect to the additional drain, the builder left it to Corrado and his plumber to decide where it should go.

Mr. Anthopoulos testified that the house price was at the high end of the price range. He stated that Mr. Corrado took possession of the home November 20, 1988 although the Deed showed that possession was taken November 15, 1988.

When he took possession, Mr. Corrado complained of certain deficiencies which the builder tried to correct, but finally they went to the New Home Warranty Program for conciliation.

Mr. Anthopoulos then went through the complaints which form Mr. Corrado's claims against the New Home Warranty Program. A consolidation of these claims was prepared by the attorneys for the New Home Warranty Program and deposited as Exhibit 30. In examining the various claims, the Tribunal shall use Exhibit 30 as the master list.

Item 1 of Exhibit 30 was withdrawn by Mr. Corrado.

Item 2 - Luminous dome ceiling lights in kitchen

Mr. Anthopoulos testified that by virtue of Schedule "A" under the heading "Kitchen Features", the builder undertook to provide the Corrados with luminous dome lighting in the kitchen work area. He stated that this type of lighting was standard in all the homes in the subdivision being built. He described "luminous dome lighting" as being fluorescent lighting which drops below the ceiling. He said that Mr. Corrado did not order "circumference lighting" which was a \$1,500 extra.

He went on to testify that Mr. Corrado refused to accept the luminous lighting so that only one light fixture was installed in the kitchen. The nub of the dispute was that Mr. Corrado believed he was entitled to what Mr. Anthopoulos described as "circumference lighting" and would not, therefore, accept the dropped lighting.

In cross-examination, Mr. Anthopoulos was shown Exhibit 14, a brochure on lighting prepared by Futuristic Ceiling, which supplied the lighting for the subdivision. The first page of the brochure showed fluorescent lighting in which the lighting itself formed a rectangle with no lighting on the inside. On this page, Mr. Harsanyi of Futuristic Ceiling wrote the word "Dome" with an arrow pointing explicitly at the illustration.

On the second page, the fluorescent lighting covered the whole of the ceiling, and on this page Mr. Harsanyi wrote the word "flat" with an arrow pointing to the illustration.

The Tribunal observes that the lighting on the first page gives the illusion of a dome since it is scooped out in the centre whereas the lighting on the second page, being flat and covering the entire ceiling, gives no feeling of a dome whatsoever.

Mr. Anthopoulos was also shown an old contract (Exhibit 15) in which the lighting was described as "dropped lighting". The Tribunal believes that this is a much clearer description of the lighting which Mr. Anthopoulos claims that Mr. Corrado was to receive.

The Tribunal also notes that in the list of features accompanying new contracts, the builder has returned to the old wording of "dropped ceiling in kitchen working area with fluorescent light fixtures" to describe the lighting to be provided.

The builder drafted all the contracts and Schedules; he is, therefore, responsible for any lack of clarity in the wording. In this regard, however, the Tribunal finds that the wording is clear; luminous dome lighting must by its very nature provide for a dome-like effect. This can only be done with what Mr. Anthopoulos calls "circumference lighting" and Mr. Harsanyi, "dome lighting". Drop lighting by its very nature provides no dome. The testimony of the other witnesses confirms this finding.

The next witness was Mr. Rick Gillman, the Real Estate Salesman who dealt with Mr. Corrado. He continues to represent the builder. He testified that he interpreted "luminous dome lighting" (Exhibit 6) as including the word "flat". The type of lighting which Mr. Corrado thought he was to receive is described by Mr. Gillman as circumference lighting.

On the other hand, Mr. Gillman could not show the Tribunal how the dome effect could be created in dropped lighting.

He went on to state that the builder no longer used the words "luminous dome lighting" to describe the standard lighting to be installed in a home.

The Tribunal finds Mr. Gillman's explanation illogical and inconsistent. The word "dome" must be given a meaning which is reasonable. Flat lighting by its very nature excludes the possibility of there being a dome-like effect. Only "circumference lighting" creates the effect of a dome.

Mr. Perryman of the New Home Warranty Program stated that Mr. Corrado received only one light fixture in his home. He stated that dome lighting had many definitions and he included dropped ceiling flat lighting as being one of them.

Mr. Corrado testified that he complained before closing about not receiving dome lighting. He described what he expected

to receive by referring to the brochure of Futuristic Ceiling. He expected to receive what was described in the brochure as 'dome lighting' and by the builder, as 'circumference lighting'.

Antoinette Corrado, the daughter of the Applicant, testified that when she discovered that Futuristic was the light supplier for the builder, she went in December 1988 to visit Mr. Leslie Harsanyi, a representative of Futuristic. She wanted his explanation of what constituted dome lighting. She was given the brochure filed in Exhibit 3 under Schedule A(1)(b).

She asked Mr. Harsanyi to indicate on each photograph the type of lighting illustrated. Mr. Harsanyi did so by writing the word "dome" with an arrow on the first page of the brochure and the word "flat" with an arrow on the second page. She also testified that Mr. Harsanyi said that circumference lighting was the same as dome lighting.

On the basis of the testimony and evidence presented, the Tribunal finds that the Applicant was not offered dome lighting. He is entitled to receive at no extra cost lighting which the Futuristic brochure calls "dome lighting" and which the builder calls "circumference lighting", and this, for the following reasons:

- 1) The vender of the new home made a substitution which was not of equal or better quality than the original lighting that was to be installed. This was in breach of Section 20(1) of Regulation 726 of the Act which applies to the contract between the applicant and the vendor, as the contract was executed in July 1988. Section 20(1) applies to purchase agreements entered into after June 30, 1988.
- 2) Even if it were found that the contract was entered into prior to June 30, 1988, the Applicant would still be entitled to what the builder calls circumference lighting because the builder failed to deliver the lighting specified in the contract.

Section 14(1)(a) of the Act stipulates that a purchaser may take an action in damages for financial loss resulting from the vendor's failure to perform the contract. At the time of the sale, the

cost to provide dome lighting was fixed by the builder at \$1500.

- 3) In any case, under the general warranties contained in Section 13, the purchaser is entitled to a home constructed in a workmanlike manner. The failure by the builder to provide the lighting constituted incomplete work, the whole in breach of the construction contract. Section 6 (7) of the Regulations limits the amount that a purchaser may claim for incomplete work. Mr. Corrado falls within these limits.

The Tribunal, therefore, holds that the claim by the Applicants for dome lighting is warrantable under the Act and orders the New Home Warranty Program to see to the installation of dome lighting or to pay to the Applicants the amount required to install such lighting up to a maximum of \$1,500.

#### Item 3 - Pop-Ups

Mr. Anthopoulos testified that Mr. Corrado received the pop-up wastes promised in Schedule "A" under bathroom features. He stated that Corrado was really asking for mechanical pop-up wastes, whereas he was only entitled to manual pop-ups.

Mr. Antonio Vacca, a plumber, testified that he did the work on most of the homes in the subdivision. He stated that pop-ups could be either manual or mechanical, and that the pop-ups he had installed in Mr. Corrado's house were manual. What Mr. Corrado received was known as a "Pop-up P.O. Plug". This is the name under which he ordered such plugs from suppliers.

Mr. E. Perryman of the New Home Warranty Program testified that Mr. Corrado received a pop-up plug.

The Tribunal finds that, on the basis of the evidence presented, Mr. Corrado received pop-ups in the bathroom sinks. The Ontario New Home Warranty Program was, therefore, justified in refusing this claim.

#### Item 4 - No full vanity mirrors

In Schedule "A", "quality features", number 13 under the title Bathroom and Laundry Features, the builder undertook to provide full vanity mirrors in all bathrooms, excluding the powder



room. The vanity was approximately 8 feet in length according to the evidence presented.

Mr. Anthopoulos testified that the builder wanted to install two four foot mirrors rather than one mirror of 8 feet in length. This was because a mirror of 8 feet would be much more fragile and easily damaged than two mirrors of four feet each.

When he attempted to make the installation, Corrado called the police to have Mr. Anthopoulos ejected from his home.

Mr. Perryman of the New Home Warranty Program testified that the New Home Warranty Program agreed with the builder's decision to install two four foot mirrors rather than one 8 feet in length because the latter would be very fragile. Mr. Corrado would not allow the installation. In the New Home Warranty Program's opinion, the installation of two four feet mirrors satisfied the obligation to provide a full vanity mirror.

Mr. Corrado testified that to him a full length mirror meant one mirror of 8 feet rather than two of 4 feet each side by side. He, therefore, insisted on receiving one mirror for the vanity.

In argument, the attorney for Mr. Corrado stated that the contract was unclear on what constituted a full length mirror.

The Tribunal notes that, in Schedule "A", the word "mirrors" is used rather than "mirror". It was the obligation of Mr. Corrado to establish either through expert testimony on the custom and usage of the industry or through the literature that full length mirrors meant a mirror in one piece, no matter what the length. It is on the Applicant upon whom the burden of proof rests in establishing his claim.

The Tribunal sees no aesthetic or logical reason for a mirror of 8 feet not being in two pieces, one flush against the other. In offering to install two 4 foot mirrors side by side, the builder has met his obligation to provide full vanity mirrors. For this reason, the Tribunal orders the Ontario New Home Warranty Program to see to the installation of the vanity mirrors in the way proposed by the builder, viz. two 4 foot mirrors side by side.

#### Item 5 - Marble pieces chipped

Mr. Corrado complained that five pieces of floor marble between the kitchen and dining room, the living room and hall, and the hall and family room are chipped.



Mr. Anthopoulos stated that the marble provided was acceptable in quality and satisfied the terms of the contract.

Mr. Perryman of the Ontario New Home Warranty Program testified that he could find no chips or defects in the marble, and that it was in proper condition.

Mr. Corrado testified that the marble was not chipped, but rather had little holes which make it impossible to clean the floor properly. He believed that the marble installed was meant for covering the wall rather than the floor.

In cross-examination, Mr. Corrado stated that he had not sought any expert opinion to determine that the marble was made for walls, rather than the floor; rather, he had come to this conclusion on his own. He admitted that the chips in the marble, if any, were natural and did not result from defects or improper installation.

In argument, the attorney for Mr. Corrado acknowledged that no independent evidence as to whether the right marble had been installed was adduced. He stated that the Tribunal should simply accept Mr. Corrado's evidence on this point.

The Tribunal finds that Mr. Corrado has not satisfied the burden of proof upon him. He has made no proof of a breach of any industrial standard with respect to the marble installed on the floor. Quite the contrary, from the evidence presented, it appears that the builder did indeed provide proper marble for the floor.

Item 6 - only one door on hall closet

Mr. Corrado complained that the main hall closet had only one door instead of two.

Mr. Anthopoulos admitted that Mr. Corrado only received one door.

Mr. Perryman testified that the plans of the home showed two doors, but that the door provided was acceptable.

Mr. Corrado testified that the floor plans showed that the closet was to have two doors. He felt that it would look more attractive with two doors.

The Tribunal finds that the plans prepared by the builder clearly indicated that the closet was to have two doors. Mr. Corrado has, therefore, satisfactorily proved his claim and the

Tribunal orders the New Home Warranty Program to see that two doors are installed.

Item 7 - Basement windows were not upgraded

Mr. Corrado paid \$1,900 for a window upgrade of his home. Mr. R. Gillman testified that the upgrade to vinyl windows did not include the basement windows. He admitted that they were not specifically excluded in the contract, but that in the building industry basement windows were never included in an upgrade. He went on to say that he informed Mr. Corrado orally that the basement windows would not be included at the time the extra was negotiated.

In cross-examination, however, Mr. Gillman did not remember having any discussion with Mr. Corrado with respect to the window upgrade and what was included or not included. He went on to state, that all other home buyers who ordered the upgrade did not get upgraded windows in the basement.

Mr. Perryman testified that Mr. Corrado received proper windows for the basement: upgrades do not, as a matter of practice, include the basement. He testified that 90% of the homes in Ontario have the same kind of windows in their basement which Mr. Corrado received. Less than 1% would have an upgraded window in the basement.

Mr. Corrado testified that when he paid \$1,900 to upgrade vinyl windows, he thought it included the basement. Later on he was told that the basement was not included. He went on to testify that at the time that the upgrade was negotiated what was included and not included was never discussed.

In cross-examination, Mr. Corrado testified that the only difference between the upgraded windows and the basement windows was that the upgraded windows had a vinyl coating. He wanted vinyl coating because he did not want to paint the windows.

The Tribunal finds that it would not be logical to install vinyl upgraded windows in the basement. The basement is an area of the home which is totally different from the upper areas, in the sense that it is unfinished and not intended to be viewed by the public.

From the evidence presented, the Tribunal is satisfied that the practice of the building industry is one where window upgrades do not include the basement. Mr. Corrado, upon whom the burden of proof lies, failed to provide any evidence which would

indicate that there was a building practice which would include the basement in any window upgrade.

The New Home Warranty Program, therefore, was justified in refusing the claim by Mr. Corrado.

Item 8 - Basement windows leak air

Mr. Corrado complained that a great deal of cold air came through the basement windows. In their letter of March 23, 1989, Exhibit 4, the New Home Warranty Program wrote that the windows showed excessive dirt in the tracks thus not allowing them to close properly.

Mr. Perryman testified that the type of windows which Mr. Corrado received were standard and that 90% of the homes in Ontario had such windows. When inspecting the basement windows, the New Home Warranty Program found that they could be closed fairly tightly.

Mr. Corrado testified that the window did not shut completely and still allowed in excessive air.

The Tribunal finds that there is no evidence that the windows were improperly installed and the proof presented by the New Home Warranty Program establishes that the windows function properly when judged against the standards that can be reasonably expected for windows of this type. The demands made by Mr. Corrado are unreasonable in the circumstances and, therefore, this item of his claim is refused.

Item 9 - The furnace runs continuously and provides insufficient heat to the second floor

Mr. Corrado complained that on colder days, the furnace ran almost continuously, but did not supply the home with sufficient heat, especially on the second floor.

Mr. Perryman testified that the New Home Warranty Program had not disallowed Mr. Corrado's claim, but had simply suspended it while awaiting for the Municipality to determine whether there was anything wrong with the furnace.

Mr. Corrado testified that the highest temperature reading in his daughter's room on cold days was 15 degrees celsius. He ascribed the problem to the furnace system not giving off enough heat. The Municipality issued a Work Order with respect to the heating. Mr. Corrado testified that after this work order was issued, a representative of the heating supplier and one of the

Municipality came to Mr. Corrado's home to try to resolve the problem. The representative of the heating company said that more air return was required on the second floor. This could be achieved by installing another pipe going to the daughter's room. The existing pipe had six elbows before reaching the room. Each elbow caused a loss of 10% in heat. Mr. Corrado stated, however, that nothing was ever done and that the supplier of the furnace had never installed another pipe.

The New Home Warranty Program informed the Tribunal that they would agree to comply with any order issued by Richmond Hill to solve the problem with the furnace.

In view of the agreement by the New Home Warranty Program, the Tribunal reserves all rights of Mr. Corrado with respect to this claim. It also orders the New Home Warranty Program to comply with any order issued by the Town of Richmond Hill setting out the method by which Mr. Corrado's problem is to be solved. The Tribunal refers to Exhibit 13(4) and suggests that Mr. Corrado get an updated order from the Town of Richmond Hill which explicitly sets out the steps to be performed to correct the heating system.

Item 10 - Not all windows and doors wired for rough in alarm

Mr. Corrado complained that not all the first floor windows and doors and none of the basement windows were wired for a future alarm system. The New Home Warranty Program in their observations (Exhibit 4) stated that the windows at the above mentioned locations had not been wired but that the rough inner alarm system had been installed. This was considered to reasonably satisfy existing standards for a rough-in alarm system.

Mr. Perryman testified that the rough-in installed by the builder was sufficient. There was no standard requiring that all windows of a home be wired for a rough-in. The New Home Warranty Program believed that sufficient windows and doors had been wired to meet the norms of the industry. In this regard, it is to be noted that the contract only called for a rough-in alarm system without specifying what was to be included. The Tribunal must base its judgment on industry standards.

Mr. Corrado testified that there was no discussion with the builder as to what was to be included in the rough-in. He also testified that all the windows and doors on the first floor had been included, except for the side door.

In cross-examination, Mr. Corrado stated that he had not taken any steps to install an alarm system; he had not sought any



quote from an alarm contractor. Thus, although he has occupied the home for more than 20 months, he has shown no intention of installing a burglar alarm system.

The attorney for Mr. Corrado stated it was for the Tribunal to decide whether Mr. Corrado had received a standard rough-in alarm system.

Based on the proof presented, the Tribunal finds that Mr. Corrado received a rough-in alarm system which satisfies reasonable industry standards. Mr. Corrado made no proof to show the contrary. The burden of proof was on him to do so. His claim is, therefore, rejected.

#### Item 11 - Ice forms on inside of windows

Mr. Corrado complained that on colder days, a great deal of ice formed on the inside of the windows. Mr. Perryman testified that Mr. Corrado failed to demonstrate that there was a problem with the insulation. At an inspection by the New Home Warranty Program, no draft was observed from the windows in question. Mr. Corrado testified that the ice formed because of a lack of insulation. He said that the ice formed only on the bottom 2" of the window and only on very cold days.

The Tribunal finds that Mr. Corrado has not discharged his burden of proof. He adduced no evidence to show that the ice formed on the bottom part of the window because of improper insulation in the windows. Nor did he prove that the builder had in any way improperly installed the windows. In fact, there was no evidence as to the cause of the ice.

Under the circumstances, the Tribunal rejects Mr. Corrado's claim. The Tribunal also notes that in a cold climate, it is reasonable to expect some formation of ice at the bottom of a window on very cold days.

#### Item 12 - No sliding door in dinette

In the original contract, Mr. Corrado paid the builder \$750 extra to have a sliding door installed off the dinette. In Exhibit 7, entitled Amendment to Agreement of Purchase and Sale, it was agreed that the door from the dinette was to be replaced by a window at the vendor's expense.

Mr. Anthopoulos admitted that the builder never installed a sliding door from the dinette to the deck. For this reason, in a letter drafted by its attorneys on February 13, 1989, the builder

volunteered to refund the sum of \$750. A cheque which included the \$750 was sent to Mr. Corrado, but he refused to cash it.

Mr. Gillman testified that the reason the door to the dinette was not installed was because the builder was no longer to provide a deck. Without such a deck, there was no purpose for a door.

Mr. Molinaro, the carpenter doing the work on Corrado's home for the builder, testified that he had originally done framing for a door in the dinette. The back wall had been framed for 6 foot sliding doors. The builder then asked him to remove the framing and to put in a window of 8 feet where the door was to go. This required a great deal of alterations on his part.

Mr. Di Gennaro, President of the builder company, testified that he had told Mr. Molinaro to remove the framing for the door and replace it with a window because Mr. Corrado had asked for this change. He went on to state that inasmuch as the door had already been framed, there was no reason for him to remove it and replace it with a window. He went on to state that he had offered to refund Mr. Corrado the \$750 which he had paid. This refund was still available to Mr. Corrado.

Mr. Corrado testified that he wanted a sliding door but never got it. When he contracted to buy the Anastasia model, the plans showed that it was to have a single door on the side and one big window on the back with a small window on the west side. He wanted the sliding door in place of the single door.

The Tribunal finds the testimony of the builder more credible than that of Mr. Corrado. It is in proof that the framing was completed for a sliding door. It makes no sense to assume the builder arbitrarily ordered the framing to be removed in order to replace it with a window. Since the framing was already there, it is more reasonable to presume that Mr. Corrado changed his mind and asked for a window to be installed instead. Mr. Corrado's claim, therefore, is unfounded; he is, however, entitled to receive reimbursement of the \$750 which he paid for a sliding door which was never installed.

The Tribunal, therefore, taking notice of the builder's offer, orders the New Home Warranty Program to refund to Mr. Corrado the sum of \$750.

#### Item 13 - No light in hall

Mr. Corrado complained that there was no light in the first floor hall. The builder testified that there was sufficient



light in the hallway. In the visits by Mr. Perryman, the New Home Warranty Program found that the hallway had lights at either end and that this was sufficient to light to whole hallway.

Mr. Corrado admitted that there were lights at either end, but felt that this was not sufficient for a 27 foot hall. The home, however, passed the electrical inspection and there was nothing in the contract which obliged the builder to provide more lighting than required by the Code.

In cross-examination, Mr. Corrado testified that there was a light in the foyer and off the staircase of the hall; there is also a light off the family room entrance abutting the hall. There are thus two lights in the hall area providing lighting for the whole of its length.

The Tribunal finds that the builder has provided sufficient lighting in the hall. Mr. Corrado, upon whom the burden of proof lies, has not proved any violation of the Building Code or of the norms set for electrical lighting. The proof, on the contrary, supports the presumption that the lighting supplied was sufficient. For this reason, the Tribunal rejects this item of claim by Mr. Corrado.

Item 14 - No wonderboard above 2 1/2 feet

In the contract of purchase, the Applicant paid an additional sum of \$550 to install wonderboard in the main bathroom and ensuite shower. The Applicant complained that the wonderboard was not installed.

Mr. Anthopoulos admitted that the wonderboard had not been installed. As a result, the builder had offered to refund the purchaser \$450. It was pointed out at the hearing that this was \$100 less than the amount paid by Mr. Corrado and Mr. Anthopoulos agreed that the amount of the refund should have been \$550. Mr. Corrado refused the refund, insisting that the bathroom be redone and the wonderboard installed.

Mr. Gillman, corroborated Mr. Anthopoulos's testimony.

Mr. Di Gennaro testified that some wonderboard was installed, but not enough. He recognized that this was a mistake by the builder and had, therefore, offered a refund to Mr. Corrado which he now agreed should be \$550.

Mr. Perryman of the New Home Warranty Program testified that no wonderboard had been installed, but that none was required by the Building Code. The New Home Warranty Program refused Mr.

Corrado's claim because it considered it to be based on a contractual matter and, therefore, not covered by the New Home Warranties Plan Act.

Mr. Corrado testified that he sought nothing less than having the tiles and drywalls ripped out of the bathrooms in order to put the wonderboard in. The cost to do so, by his own admission, would amount to \$5,761.

The Tribunal recognizes that the builder has failed to provide wonderboard, the whole in breach of the contract. On the other hand, Mr. Corrado has failed to establish that the bathrooms have been damaged or that they will be damaged as a result. This being the case, the Tribunal finds that it would be excessive to order the New Home Warranty Program to rip apart the bathrooms involved in order to have wonderboard installed.

The builder, however, in failing to complete the work contracted for, has breached the Section 6(7) of Regulation 726 of the Act. Under the circumstances, the Tribunal orders that the Applicant be reimbursed the sum of \$550, in accordance with the builder's offer.

#### Item 15 - No oil paint throughout

In the purchase contract, Mr. Corrado paid an additional \$400 for "oil paint". The document did not indicate how much of the home was to be so painted.

On its inspection, the New Home Warranty Program found that oil paint had not been used throughout the home, but rather only in the washrooms and kitchen.

The builder claimed that only the washrooms and kitchen were to be painted with an oil based paint.

Mr. Perryman of the New Home Warranty Program testified that this item was not covered because it was purely of a contractual nature and its terms, in any case, were not clear.

Mr. Corrado testified that the \$400 was paid to upgrade the paint from latex to oil paint.

The builder offered to refund Mr. Corrado the \$400 in view of the misunderstanding as to what was to be included.

The Tribunal notes that in Exhibit 14, under the heading "interior features", Item 11 states that kitchen walls, powder room

walls, bathroom walls and laundry room walls are to be semi-gloss. This would create the presumption that oil paint was only to be used in those rooms since the rest of the home was to receive an interior paint colour from samples provided by the builder.

The Tribunal finds that Mr. Corrado has not established that oil paint was to be used throughout the home. On the other hand, the builder has failed to satisfy his responsibility to clearly set out his undertakings and has acknowledged this by offering to refund the \$400 paid by Mr. Corrado.

The Tribunal orders that Mr. Corrado be paid the sum of \$400 in accordance with the builder's offer.

Item 16 - Garage not 19'6" functional use

In the Amendment to Agreement of Purchase and Sale, the vendor agreed to extend Corrado's garage to a depth of 19'6".

Mr. Perryman of the New Home Warranty Program testified that the garage was, indeed, 19'6" deep. He went on to state that the back of the garage led off to the basement. Steps, required to go from the garage to the laundry room, were constructed in the garage and occupied 3'. As a result, the usable space of that part of the garage became 16'6".

Mr. Corrado has argued that putting the steps in the garage constituted defective workmanship. The builder claimed that the plans did not stipulate where the steps were to be constructed. Since they were necessary, it was for the builder to decide where they were to be installed.

Mr. Corrado testified that the garage was intended to house three cars, but that only two cars could occupy the garage since all were more than 16 and 1/2 feet in length. Mr. Corrado has asked that the steps be removed from the garage and constructed in the laundry room.

The Tribunal rejects Corrado's claim for the following reasons:

- 1) Nothing in the contract stipulated where the steps were to be placed.
- 2) The plans of the home do indicate the location of stairs inside the home. The absence of any indication of stairs in the laundry room area,

therefore, leads one to presume that the stairs were to be built in the garage.

- 3) The builder placed the stairs in the garage in all the other homes in the subdivision

Item 17 - Dinette dimensions 9'6" x 17' not 11'6" x 17'

In the Amended Agreement, the builder agreed to widen the dinette to 11'6". Mr. Rick Gillman negotiated on behalf of the builder. He testified that everyone understood that the extra width would come from the family room, which would lose 2' of width where required. This was because the home was to have the exact same square footage as indicated in the plans; this meant that the additional square footage for the dinette had to be created from the existing footage, which could be taken from either the family room or the kitchen.

In cross-examination, Mr. Gillman said that it made sense to take the space from the kitchen because there was no wall between the kitchen and the dinette. This was what the builder did. Mr. Corrado, however, was not satisfied because he wanted the extra space to be created by moving in the wall of the family room.

Mr. Gillman did admit, however, that the way in which the dinette was extended created a configuration which was "illogical". The builder's workmanship was deficient in the sense that, had the extension been taken out of the family room, the configuration would have been far better. While Mr. Corrado received a dinette 11'6" in width, the builder's workmanship was deficient because the configuration did not allow the full enjoyment of the space.

Mr. Di Gennaro testified that perhaps the space should not have been taken from the kitchen and for this reason had offered to refund Mr. Corrado \$2,500.

Mr. Corrado stated that during construction he noticed the dinette was being extended in an unacceptable fashion. Despite this, he made no mention of this in the Certificate of Possession, and proceeded to the closing of the sale. The Tribunal can only presume, therefore, that Mr. Corrado accepted the extension of the dinette; if it had been a major issue, it would certainly have been raised in the Certificate of Possession.

Mr. Corrado testified, moreover, neither he nor the builder drew a floor plan setting out how the dinette was to be configured.

Because he was represented by solicitors during the preparation of Certificate of Possession and the closing, the Tribunal presumes that any deficient workmanship was not a major concern for Mr. Corrado.

The Tribunal finds on the evidence that the extension of the dinette suffered from deficient workmanship. The builder has offered to pay Mr. Corrado \$2,500, which the Tribunal finds reasonable. For this reason, the Tribunal orders the New Home Warranty Program to pay to Mr. Corrado the sum of \$2,500.

Item 18 - Pantry door warped

Mr. Perryman testified that there was a very slight bow in the pantry cupboard door. Because the warpage was not excessive, the door was considered to be acceptable by the Program.

Mr. Corrado testified that this item was "not a big deal". He said that the warp was bent from 1/4 to 1/2 of an inch, but was very unclear as to the exact warpage. In cross-examination, he admitted that the door functioned properly and was only warped "a little bit". He went on to state that, "It is no big deal. It can stay".

Because Mr. Corrado has failed to establish his claim, the Tribunal rejects it.

Item 19 - Garage concrete floor contains cracks

Mr. Corrado complained of cracks appearing in the concrete floor of the garage.

Mr. Perryman testified that because the cracks were only of a minor nature, they were not covered by the Act. The Program considered them to be the result of shrinkage and/or settlement of material and these are excluded from warranty under the Act.

Mr. Corrado testified that the cracks were small. He alleged no water penetration of any sort as a result of these cracks. He presented no photographs.

The Tribunal finds that Mr. Corrado has not proved his claim. The cracks of which he complains would result from normal shrinkage and/or settlement, are minor, and have not resulted in any penetration of water. They are specifically excluded from coverage by virtue of Section 13(2)(c) and (d) of the Act.



Item 20 - No shower light

Mr. Corrado complained that no light had been installed in the shower enclosure of the master bedroom. In Schedule "A" (Item 1 of bathroom and laundry features), the builder undertook to install a waterproof shower light "where applicable". There was, however, no explanation of when a shower light was to be installed.

The Tribunal interprets "where applicable" to mean where a shower light is actually necessary in order for those using the shower to be able to see properly.

Mr. Anthopoulos testified that none of the 40 homes built in the subdivision was furnished with a shower light because the builder felt that none of the showers required additional lighting. There was sufficient indirect lighting from the bathroom to properly illuminate the shower area.

Mr. Gillman testified that the only home which would receive a shower light was the Frederica model because there was insufficient light from the main lighting fixture in the bathroom to properly illuminate the shower area. He went on to state that no shower lights were installed in the Anastasia model home.

Mr. Di Gennaro testified that no shower light was necessary for the Anastasia model, but only for the Frederica, because, in the Frederica, not enough light was cast into the shower area. Mr. Perryman testified that no shower light was required since there was sufficient light from the bathroom to properly illuminate the shower area.

Mr. Corrado testified that when negotiating the contract, there were no discussions as to whether he would get a shower light. He produced no proof whatsoever to establish that there was an undertaking to provide a shower light. Nor has he proved that one was needed.

The Tribunal, therefore, rejects his claim.

Item 21 - Family room window not centred

Mr. Corrado complained that the window in the family room was not centred. In its Conciliation Report, Exhibit 5, Item 15, the inspector found that the window appeared to be approximately 2 feet off centre from within the internal wall, but that with respect to the exterior wall, it appeared to have been centred.



Mr. Corrado testified that the window was centred on the outside but not the inside. This was because of the change in floor plans to accommodate the larger dinette area. By widening the inside wall, the window ceased to be centred inside.

The Tribunal finds that Mr. Corrado has not proved any deficiency in the work by the builder. He is presumed to have known that the window would cease to be centred inside once he changed the floor plans of the dinette. In as much as the window is centred on the outside, the workmanship must be proper.

Item 22 - No extra shower drain in basement

At the time of purchasing the home, Mr. Corrado paid \$250 to have an additional drain installed in the basement. Despite this, the builder failed to do so.

Mr. Gillman testified that he did not know where the additional drain was to be installed in the basement. He admitted, however, that it had not been installed.

The inspector from the New Home Warranty Program observed that no extra shower drain had been installed in the basement.

Mr. Corrado testified that the second drain was required to allow for a future bathroom.

The Tribunal finds that Mr. Corrado is entitled to receive the second drain for which he paid. The failure of the builder to install the drain constituted deficient workmanship. It was also a failure on the builder's part to complete the home. The New Home Warranty Program is, therefore, ordered to see to the installation of a second shower drain in the basement.

Item 23 - Furnace system not appropriate for air conditioning

Mr. Perryman testified that Mr. Corrado gave the New Home Warranty Program no evidence to substantiate that the cooling system in the dwelling was inadequate. The inspection report of the Program referred to a letter which verified "heating/cooling system showed no defects at time of inspection with local building department." Mr. Perryman stated that should Mr. Corrado demonstrate defects existed in the system, the New Home Warranty Program would carry out the proper repairs.

Mr. Corrado testified that the problems with the air conditioning system were related to those existing with the heating system.

The Tribunal finds that Mr. Corrado has not at this stage established the existence of a defect in the system. As with Item 9, the Tribunal therefore reserves Mr. Corrado's rights against the New Home Warranty Program under the same terms and conditions as set out in Item 9.

#### Item 24 - Ceramic tile grain pattern

Mr. Corrado complained that the pattern of the ceramic tiles on the first floor did not match in various places. Mr. Perryman testified that he found the floor to be "beautiful, very well done, and with no cracks in the tile". He saw no basis for Mr. Corrado's complaint.

Mr. Corrado testified that between 20 and 25 of the 400 tiles may have been mismatched.

In cross-examination, he testified that he had picked the tile pattern, but saw no instructions on how the tile was to be laid.

The Tribunal was also presented with a photograph of the tile work. From the photograph, the Tribunal could observe no problem. Aesthetically, it was appealing to the eye.

The Tribunal rejects this claim because Corrado has failed to establish that the tiles were laid improperly. On the contrary, the proof established that the tile work was excellent.

#### Item 25 - No second electrical outlet in bathrooms

Mr. Corrado complained that he was entitled to have a second electrical plug installed in both the upstairs bathrooms.

Mr. Anthopoulos testified that in all the homes built in the subdivision only one plug was installed per bathroom. Moreover, in the specifications with the contract of purchase, nowhere was it stated that Mr. Corrado was entitled to more than one electrical outlet.

Mr. Perryman testified that the Ontario Building Code and the Hydro Electric Code required only one electrical plug in a bathroom.

Mr. Corrado testified that he based his claim for a second plug on "common sense". He felt that since there were two sinks in a bathroom, he was entitled to a separate outlet for each sink. He admitted that the contract did not say he would receive

two outlets, nor was he ever told by the builder that he would. What he did receive was a double plug at one side of the full length vanity mirror.

The Tribunal finds that Mr. Corrado is not entitled to a second electrical plug. There is nothing in the contract which would give him this right and the bathroom satisfied the Building Code requirement with the one double plug installed.

#### Item 26 - Front steps

Mr. Perryman testified that the front steps were properly installed and contained no defects.

Mr. Corrado testified that the steps installed were meant to be temporary. His was the first home built in the subdivision and all the other houses except for one had steps constructed in concrete. He felt that he was entitled to the same type of steps.

In cross-examination, Mr. Corrado said that his steps moved and were dangerous because of shifting around and containing gaps.

The Tribunal finds that the front steps contain a defect since they should not move. It, therefore, orders the New Home Warranty Program to see to the repair of the steps in order that they be completely secure and safe. Mr. Corrado did not, however, prove that he is entitled to concrete stairs. No such undertaking was every made by the builder.

#### Item 27 - Joists

Mr. Corrado complained that the joists of the house are 2 x 8 every 16 inches, with 13 foot spans. This is not in accordance with the Ontario Building Code.

Mr. Molinaro, the carpenter who did the work on Mr. Corrado's house, testified that the floor joists under the kitchen contained certain spans which were more than 12 feet, in breach of the Ontario Building Code. He, therefore, doubled up those joists with bridging between them. This procedure was approved by the municipal inspectors.

In the inspection report dated December 4, 1989, Mr. Perryman wrote that the complete floor joist system had been reviewed and measured for spans. It was found that all floor joist spans for the first floor were within the limits set out in the Ontario Building Code except for 15 floor joists under the kitchen

area. Those joists were found to span approximately 12'4" to 12'9".

Mr. Perryman testified that this deficiency was properly repaired by overspanning; that is, by doubling every other floor joist which exceeded the 12' span. After the repair work, the floor joists satisfied the Ontario Building Code.

Mr. Corrado testified that blocking was still required to finish the doubling of the joists.

The New Home Warranty Program was prepared to see to the installation of solid bridging in these joists - to do blocking.

Mr. Corrado has not established that the corrections made by the carpenter constituted deficient work. He has, however, established that the blocking or bridging must still be done. The Tribunal, therefore, orders the New Home Warranty Program to see that the blocking is carried out and that no damage is caused to the ceramic tiles as a result of such blocking.

#### Item 28 - Ceramic tiles move and are noisy

Mr. Corrado complained that the ceramic tiles on the first floor moved and made noises in various places when walked on. Mr. Perryman testified that at first certain tiles squeaked, but the builder had proceeded to repair them. Mr. Perryman tested the floor and found that the repairs were properly carried out.

Mr. Corrado stated that the ceramic tiles continued to squeak in certain places.

The Tribunal finds that Mr. Corrado failed to make proof of a defect in the ceramic tiles. For this reason, his claim under this item is rejected.

#### Item 29 - Clothes bar missing

The New Home Warranty Program has consented to install a clothes bar in the closet. The Tribunal, therefore, orders the New Home Warranty Program to proceed with installation of the clothes bar.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow claims with respect to Items 2, 4, 6, 9, 12, 14, 15, 17, 22, 23, 26, 27, and 29; and disallows Items 3, 5, 7, 8, 10, 11, 13, 16, 18, 19, 20, 21, 24, 25 and 28.

DESOTO DEVELOPMENTS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
D.H. MACFARLANE, member

APPEARANCES: JOHN TURINGIA, representing the Appellant, DeSoto  
Developments Ltd.

BRIAN M. CAMPBELL, representing the  
Ontario New Home Warranty Program

DATES OF HEARING: July 4, 5, 6, 9, 10, 11, 12, 13,  
December 10, 11, 12, 13, 14,  
December 17, 18, Burlington  
1990 Toronto

#### REASONS FOR DECISION AND ORDER

DeSoto Developments Ltd. ("DeSoto") of Burlington applied as a new construction company to be registered under the Ontario New Home Warranty Program by an application dated October 8, 1985, which was received by the Program on October 25. The usual Vendor/Builder guarantee Agreement was completed by Larry Paletta and Renzo Leonardi, the two principals of the new company, and the usual Vendor/Builder Agreement was also completed. Registration was granted by Number 12-1349 effective as of December 10, 1985; with a renewal date noted as January 10, 1987.

A Notice of Renewal dated November 28, 1986, showed 57 enrolments of homes in the Program with 21 Certificates of Completion and Possession having been issued and one complaint which was resolved. The Application for Renewal of Registration was completed on December 8, 1986 and received on January 21, 1987; when it was apparently routinely processed.

On February 1, 1988, the Registrar issued a Notice of proposal to refuse to renew registration for two reasons:



1. Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, (the "Act"), the Registrar finds that you have failed to provide the security required with respect to the construction and sale of houses, requested of you by letter(s) dated November 16th and December 14th, 1987.
2. Pursuant to the provisions of Section 8(2) of the Act, you are in breach of a condition of registration, TO WIT:
  - (a) You have failed to comply with subsections 3 and 6 of Regulation 728 and Section 10(3), Part 3 of Regulation 726, requiring you to furnish such documentation as the Registrar may require and request and which was requested of you in paragraph 1 above.

On receipt of a certified cheque of \$25,000 in early April, 1988 and upon compliance with certain terms, the Notices of Proposal were cancelled and registration of DeSoto Developments Ltd. was continued, with the next renewal date set as January 10, 1989.

On September 20, 1988, the Registrar issued a Notice of Proposal to revoke registration for the following reasons:

1. Pursuant to the provisions of Section 7(b) and 7(d) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, (the "Act"), the Registrar finds that:
  - (a) As a registered builder the past and present conduct of Mr. Lorenzo Paletta, President of DeSoto Developments Limited, affords reasonable grounds for belief that he has not carried on his undertakings in accordance with law and with integrity and honesty.



- (b) That DeSoto Developments Limited does not have sufficient technical competence to consistently perform the warranties as evidenced by its record of conciliations.

That Notice of Proposal was appealed by the registrant.

On December 20, 1989, the Registrar issued a revised Notice of Proposal to revoke registration for the following reasons:

1. The registrant has a record of breaches of warranty sufficient to warrant that its registration be revoked: s. 8(2), Ontario New Home Warranties Plan Act (the "Act"). The particulars are as follows:

- (a) The registrant built 263 homes in Fort Erie, Hamilton, Stoney Creek, and Welland, Ontario.
- (b) The Warranty Program received claims for breach of warranty from the respective owners of 100 of these homes, and consequently carried out inspections of these homes. The Warranty Program thereupon allowed the claims in respect of 41 of these homes. For the purposes of this Proposal, the Registrar relies upon the inspection results for fifteen of these homes, as set out below:

<u>Enrolment No.</u>	<u>Municipal Address</u>
13-600-12724	947 Concession Road, Fort Erie ("Joon residence")
13-600-12702	111 Briarsdale Crescent, Welland ("Mossey residence")
13-600-11773	59 Briarsdale Crescent, Welland ("Montgomery residence")
13-600-12698	117 Northwood Drive, Welland ("Page residence")
13-600-12178	113 North Wood Drive, Welland ("Bentivoglio residence")

13-600-12700	85 North Drive, Welland ("Weber residence")
13-600-11908	968 Concession Road, Fort Erie ("Johnston residence")
13-600-12699	137 Northwood Drive, Welland ("Beaird residence")
12-1349-54353	330 Greencedar Drive, Hamilton ("Kratina residence")
12-1349-46656	12 Vega Crescent, Stoney Creek ("Bains residence")
12-1349-41473	104 Valera Drive, Stoney Creek ("Posthumus residence")
12-1349-41474	96 Valera Drive, Stoney Creek ("Welsh residence")
12-1349-48224	72 Gurnett Drive, Hamilton ("Rashid residence")
12-1349-50135	2 Franchesca Court, Hamilton ("Silvestri residence")
12-1349-50136	14 Franchesca Court, Hamilton ("Stewart residence")

- (c) Based upon its inspections, the Warranty Program identified breaches of warranty in respect of each of the fifteen homes. The particulars of the breaches of warranty are set out in the conciliation reports attached as Appendix A hereto.
- (d) The Warranty Program mailed a copy of each of the aforementioned conciliation reports to the registrant on or about the date shown on each report, and required the registrant to rectify the breaches of warranty identified therein. To date, the registrant has failed or refused to rectify the breaches of warranty as required.
- (e) As a result of the registrant's breaches of warranty and refusal or failure to rectify the same, the Warranty Program has, to date paid a total of \$173,530.52 from the compensation fund either in the form of compensation to the owners of the fifteen homes or as payment for work arranged by the Warranty Program in

lieu of compensation. The Warranty Program invoiced the registrant for all amounts paid out of the compensation fund, plus a 15% administration fee, but the registrant has failed or refused to reimburse the Warranty Program pursuant to the invoices. The particulars of the amounts paid by the Warranty Program from the compensation fund and the amounts invoiced to the registrant are as follows:

<u>Enrolment No.</u>	<u>Amount Paid By Program</u>	<u>Amount Invoiced To Registrant</u>	<u>Date of Invoice(s)</u>
13-600-12724	7,425.00	8,538.75	Oct. 11/88
13-600-12702	850.00	977.50	Apr. 7/89
	1,830.00	2,104.50	Apr. 7/89
	425.00	488.75	June 1/89
	36,220.00	41,653.00	Oct. 24/89
13-600-11773	16,813.00	19,334.95	Apr. 7/89
	832.95	957.89	July 13/89
13-600-12698	5,425.00	6,238.75	Sept. 13/89
13-600-12699	2,705.00	3,110.75	Mar. 3/89
	510.00	610.00	Apr. 7/89
	700.00)	931.50	Apr. 26/89
	110.00)		
	2,924.57	3,363.25	Oct. 24/89
	30,000.00	34,500.00	Oct. 24/89
	450.00	517.50	Oct. 24/89
13-600-12178	10,760.00	12,374.00	May 24/89
13-600-12700	6,775.00	7,791.25	July 19/89
13-600-11908	5,200.00	5,980.00	June 13/89
12-1349-41473	9,000.00	10,350.00	Mar. 3/89
12-1349-41474	3,375.00	3,881.25	Mar. 3/89
12-1349-48224	4,000.00	4,600.00	Dec. 2/88

12-1349-50135	14,000.00 400.00	16,100.00 460.00	Feb. 21/89 June 23/89
12-1349-50136	2,725.00 900.00	3,133.75 1,035.00	Jan. 25/89 Apr. 26/89
12-1349-46656	4,325.00	4,973.75	Sept. 25/89
12-1349-54353	4,850.00	5,577.50	Nov. 1/89

- (f) Particulars of further amounts paid by the Warranty Program and invoiced to the registrant subsequent to the date of this Notice will be provided to the registrant prior to the hearing in respect of this Notice, if such a hearing is requested.

2. The registrant does not have sufficient technical competence to consistently perform the warranties under the Act: s. 7(1)(d) and 8(2) of the Act. The particulars are as set out in paragraphs 1(a) to (e) above.

3. The registrant is in breach of a condition or conditions of registration: s. 8(2) of the Act. The particulars are as follows:

- (a) The registrant's breaches of warranty, failure to rectify the same, and failure to indemnify the Warranty Program, as set out in paragraph 1 above, constitute a breach of the condition of registration prescribed by Re. 728, s. 1, para. 3, namely, that the registrant shall diligently perform or cause to be performed all obligations imposed on it under the Plan and under the Vendor/Builder Agreement dated December 10, 1985.
- (b) The registrant's failure to indemnify the Warranty Program, as

set out in subparagraph 1(e) above, constitutes a breach of the condition of registration prescribed by Reg. 728, s. 1, para. 4, namely, that the registrant shall indemnify and save harmless the Warranty Program from any loss it suffered by reason of its failure to diligently perform or cause to be performed all obligations imposed on it under the Plan and under the Vendor/Builder Agreement dated December 10, 1989.

The amount as set out in the Proposal with respect to 15 of 41 Chargeable Conciliations was a total of \$173,530.52. As detailed in Exhibit 63, the Program has paid \$828,026 in claims with respect to DeSoto Developments Ltd. Of 393 properties enrolled, 306 had Certificates of Completion and Possession. There were 165 complaints of which 150 went to conciliations; and of which there finally were 139 Chargeable Conciliations.

This appeal was to be heard commencing February 7, 1989. Adjournment on consent occurred as of January 23, 1989 and various negotiations and discussions continued. The Notice of Hearing for this appeal was issued on January 29, 1990, and was returnable July 4, 1990.

The appeal to this Tribunal began on July 4, 1990 and over eight days, witnesses for the Program set out their evidence.

Those witnesses and their responsibilities were:

- Andy Richters - "Richters" has been a technical representative and a conciliator with the Program for 10 years in the Hamilton and Regional office. He is 58, with 40 years experience in home construction. He was involved with 5 of the 14 examples brought before the Tribunal (Posthumus, Rashid, Silvestri, Montgomery and Page), and with 7 other DeSoto conciliations.
- John Nielsen - "Nielsen" has been a conciliator with the Plan in the Hamilton and Regional office for 15 years. A journeyman carpenter, he came to Canada from Denmark in 1956 and worked as a foreman, a builder's hardware representative and a site superintendent.

He was the conciliator (Stewart) and was involved with two other examples brought before the Tribunal (Montgomery and Page).

Mark Roccatagliata- "Mark" is a 1984 graduate of the Architectural Technology course at Mohawk College and has been a conciliator for two and one-half years with the Program at the Hamilton and Regional office. He was the conciliator on 5 of the examples (Joon, Mossey, Bentivoglio, Bains, Beaird) and was involved in one other (Silvestri). He took part in some 70 DeSoto files and stated that no other builder had as many conciliations. Since 1982, he does design and renovation for custom work in his own part-time business.

Gary W. Price - "Price" graduated from Mohawk College in 1975 as a civil engineer technician and was employed at Stelco in Hamilton for 12 years. Since 1986, he has served in Toronto, Hamilton and now Kitchener with the Program. He is the Regional Manager of the Kitchener office since March 1990 supervising activities in southwestern Ontario in claims processing, promotion and advertising, enrolment investigation and liaison with Municipal building officials. As a conciliator, he processed 250 to 300 claim files in a year while in the Hamilton office. He was the conciliator on 3 of the examples (Kratina, Johnston and Weber).

Brian Allick - "Allick" is the Director of Inspections for the City of Hamilton. A 20-year employee, he supervises 37 inspectors who enforce the Ontario Building Code and other by-laws. He is fully experienced in all matters of housing from front porches to high-rise apartment buildings; and is a director of the Ontario Association of Building Officials.



Larry Milligan - "Milligan" has been the Building Inspector for Stoney Creek for 14 years; and supervises 5 field inspectors.

Wm. Robert Hart - "Hart" has been the Regional Manager of the Hamilton-Niagara region for the Ontario New Home Warranty Plan for 6 years; and was the Registrar for the Plan for 7 years previously.

Counsel for the New Home Warranty Plan brought evidence with respect to 14 properties set out in the Revised Notice of Proposal. The "Welsh" file has been misplaced and no evidence was heard concerning that property. This evidence was heard on July 4, 5, 6, 9, 10, 11, 12 and 13 of 1990.

On December 10, 11, 12, 13, 14 and 17, 1990, evidence was brought by counsel for the registrant with respect to the 14 examples.

The seven witnesses for the registrant who were called concerning these particular properties were:

John Nielsen

Andy Richters

Jack Smith - "Smith" has been a real estate salesperson for 5 years in the Hamilton area and visited the "Beaird" property.

Frank Schuster - "Schuster" was employed by DeSoto Developments Ltd. for 2 years up to July 1990. Trained in Romania as a pipe fitter and plumber, he has had building experience since 1957 and built homes and remodelled on his own for 5 or 6 years. He was the carpenter and maintenance man at DeSoto and was responsible for after-sales service and did much general repair on certain of the properties.

Bob Wood - "Wood" was an employee of DeSoto Developments Ltd. for 3 years up to April

1990. He was involved in purchasing materials, warehouse management and material delivery and after a year of employment worked with customers on the selection of various finishing items in homes. Since 1961, Wood has worked in the wholesale areas of the building trades and is generally knowledgeable with site visits to the various properties referred to. In addition, he went to the occasional conciliation if no one else was able to attend.

James Monaco

- "Monaco" has been a construction worker for 16 years and is involved in the laying of tile and brick and other cement work.

Bruce Jaques

- "Jaques" is a 1980 graduate of the Construction Technology course at Fanshawe College. He was involved in the assembly of pre-engineered buildings in Ontario and Manitoba, and was employed as an estimator for residential repairs and renovations. He became an employee of DeSoto Developments Ltd. in June 1987 as an estimator and purchaser, and laterally as a superintendent of one of the building sites; then service manager and superintendent of new homes in Ancaster. He attended many conciliations on behalf of his employer and was involved in the cash settlement directly with clients of many of the complaints and concerns which they brought to DeSoto during his 3 years as an employee until June 1990.

The registrant had 9 further witnesses whose general evidence will be reviewed after each of the 14 examples is considered. Larry Paletta was the last witness to be called. Finally, argument was heard by the Tribunal on December 18, 1990.

#### POSTHUMUS RESIDENCE

Richters was the conciliation inspector for this property. Forty complaints were received in a letter dated

February 22, 1988 and nothing was completed by the builder DeSoto. The inspection occurred on June 8, 1988 with Ms. B. Jurdy and Mr. J. Quaglia as the builder's representatives. There was no disagreement with the matters that were found and 29 Schedule "A(1)" warranted items were listed of which 2 had been attended to. The major items listed were the floors in the kitchen and bedroom that were squeaking badly, the unevenness of the kitchen floor, the sagging of the front hall floor, the basement stairs not having uniform risers and not being properly supported, a lack of floor joist support and water leakage. A copy of the conciliation report was sent to the builder on June 17, 1988 with 15 days being given to do the repairs that were to start in 14 days. The usual letter that is sent is set out as follows:

"REGISTERED ACKNOWLEDGEMENT DUE"

Date: June 17, 1988

Ref: #12-1349(41473)

DeSoto Developments Ltd.  
3390 South Service Road  
Burlington, Ontario  
L7N 3J5

Dear Sir:

Re: Posthumus residence, 104 Valera Drive,  
Stoney Creek, Ontario

Enclosed is a copy of the conciliation report on the above property. Please be advised THIS IS YOUR ONLY NOTICE to substantially complete the work as listed on Schedule "A(1)" within forty-five (45) days of receipt of this letter. You are to contact the purchaser and make arrangements to commence the work within fourteen (14) days unless the purchaser requests a delay. Your purchaser has been advised to contact us should you fail to respond to this notice within the specified time.

If there is a legitimate reason why any item cannot be completed within the time specified above or you object to the warrantable determination of the item, you MUST notify the Warranty Program in writing prior to the expiry date of the notice period with an explanation as to the reason.

Should you fail to proceed with and complete the work as detailed in Schedule "A(1)" in the above time frame, you

will be considered to be in breach of your warranty, and the Warranty Program will resolve the outstanding warranted items. You will then be invoiced for our full cost, including an administrative fee.

Yours truly,

W. Robert Hart  
Regional Manager

encl.

The owners noted that no response had been made and a reinspection occurred on November 29 by Richters. \$8,200 was paid to Boudreau Homes Ltd. to do the work, together with a cost of \$500 to replace tile in the laundry room and \$300 to repair the family room floor which work was found to be necessary on site.

To the total of \$9,000, the sum of \$1,350 was added as a 15% administrative cost, giving a grand total of \$10,350 on the invoice sent to DeSoto on March 3, 1989.

On cross-examination, Richters outlined the general procedure with respect to the floor joist work being done by notching which in this case made the whole result worse and required greater repair. In addition, he noted that problems with the stairs were a very important violation of the Ontario Building Code. No notice was given to DeSoto after the contract was awarded and Richters commented that the builder can not appeal a Conciliation Report while the owner can, of course, appeal such a report to this Tribunal.

#### RASHID RESIDENCE

Richters was the representative for the New Home Warranty Program in this file. Items were set out on the Certificate of Completion and Possession to be corrected or completed and on November 24, 1987, a complaint letter came to the Program from Rashid's solicitor. This letter outlined 9 problems and 49 particular deficiencies. A conciliation was asked for on April 25, 1988 and took place on September 6, 1988. Jaques was the builder representative and 18 items appear on Schedule "A(1)", including exterior grading and other various minor items. This report was sent out with the usual letter on September 19 and the builder was given 30 days to repair the work and was to begin these repairs within 10 days. Seven new complaints led to a reinspection on November 11, 1988 and 2 items further were allowed that had earlier been rejected. A letter to DeSoto on November 28, 1988 set out

that a cash settlement was proposed in the amount of \$4,000 and the estimate was prepared by Richters. DeSoto replied on December 1, 1988 that \$4,000 was too high and ventured that \$2,500 was enough.

In the result, \$4,000 was paid and that amount, together with a 15% administration cost in the amount of \$600 brought a total of \$4,600 sent to DeSoto by invoice on December 22, 1988.

Richters noted in his evidence that he deals with three or four files each week and of the total of about 200 per year, only one in five go to conciliations. Further, only one-quarter of that figure then are resolved by cash settlements.

Richters acknowledged that the builder could do the work cheaper or, indeed, subtrades might repair various items at no cost to the builder. However if the builder does nothing, the Program must act.

On cross-examination, it was noted that many minor items were attended to by the builder who would still be prepared to pay \$2,500. Richters acknowledged this to be the case and would ordinarily review these files if disputes arose as to particular items, but none were followed through in this matter. The items in this file were all routine ones, but the number of them was certainly greater than that for the average builder.

#### SILVESTRI RESIDENCE

Richters was again the representative for the Home Warranty Program in this file. He noted that a complaint letter dated February 8, 1988 was received on March 22, 1988 with a copy of a four-page letter of items sent to DeSoto. A conciliation was requested on April 12, 1988 and on June 21, a further letter was received with 48 other items.

The conciliation occurred on August 15, 1988 with Jaques present for the builder and no objections being made to the various items which were placed on the Schedule "A(1)". These items covered 34 of the particular points raised earlier, together with 3 new items; while 13 items were put on the "A"(2) Schedule.

The items on the warranty schedule included squeaking floors, a whirlpool bath not working, cracked floor tiles, painting and trim, and bricks splattered with mortar. A copy of this Conciliation Report went to the builder with the usual letter on August 22 and the builder was given 45 days to complete the work with requirement to commence it within 14 days.



The builder, in fact, completed 10 items and on a reinspection of October 12, a Work Schedule of 24 items was then made up by Richters.

A second conciliation by Mark took place and a Work Schedule was completed since the builder's representative was not present. Twenty-eight warranted items were looked at and there was a reinspection on November 6 when some were done, others were not or poorly done.

There was some difficulty in access since Mr. Silvestri was just off the night shift at his job.

An estimate on 25 items by Atinas Homes Ltd. was given based upon the Work Schedule value of \$7,048 prepared by Richters and the value of \$8,145 prepared by Mark. A cash settlement of \$14,000 was made on January 5, 1989. The additional administrative fee of 15% of \$2,100 was added to this amount in an invoice sent to DeSoto on February 3, 1988 in the amount of \$16,100.

A further visit occurred for the "A(1)" items that were said to be warranted for certain basement windows and garage door locks. Again a cash settlement was given in the amount of \$400 with an administrative fee of \$60 added on to an invoice sent to DeSoto on June 23, 1989 in the amount of \$460.

In cross-examination, Richters noted that there would be no variance in the judgement calls which a conciliator has to make if the builder had not been co-operative in the past. While Mrs. Silvestri was somewhat difficult, he noted that the real problem here was the timeliness in completing the various repairs.

In cross-examination, Mark stated that he was unaware of a certain report on a television newscast with respect to this property and had thought, in fact, that the brickwork should have been repaired earlier than that event and not as a result of the publicity which developed.

#### MONTGOMERY RESIDENCE

Nielsen was the conciliator for the New Home Warranty Program on this project which first came to his attention on September 30, 1987. A conciliation was requested on December 18, 1987 and a nine page list and two extra lists eventually became a master list of 178 complaints which had to be dealt with at the conciliation on January 27, 1988. Vince Pingue was present for the builder and certain work was underway so the visit was not treated as a conciliation.



On February 10, a letter was sent to the builder in order to have work done by March 1 and any exterior work required by May 15, 1988. Some of the work was completed, but a formal conciliation occurred on March 11 when Mr. Pingue was again present on behalf of the builder. Some 40 items covering each area of the house were complained about, together with a further list of complaints being offered by the owner. The usual letter was sent out giving the builder 20 days to complete the work and 10 days to commence the repairs. A Work Schedule was prepared and then another list of 25 items of complaints were received on June 8.

W.S. Walters Construction Limited provided an estimate to complete the various outstanding items and the work was done to a value of \$16,813. With the added administrative cost of 15% in the amount of \$2,521.95, an invoice to the builder was sent on March 24, 1989 in a total amount of \$19,334.95.

A further claim with respect to certain carpeting was cash settled in the amount of \$832.95. With the 15% administrative cost added in the amount of \$124.95, an invoice for the total amount of \$957.89 was sent to the builder on July 13, 1989.

Richters completed a second conciliation on this property with respect to basement leak concerns and he completed a repair Work Schedule with a 15-step sequence as to the repairs that were necessary. The basement concerns were referred to in the original Conciliation Report. Boudreau Homes Ltd. did an estimate of \$7,400 and was awarded the contract to complete the work. An invoice was sent on November 14, 1989 to the builder in that amount, plus a 15% administrative cost of \$1,110 for a total amount of \$8,510.

On January 11, 1990, further complaints were received and Richters did a reinspection allowing 8 complaints and refusing 2. A further Work Schedule was prepared and Boudreau Homes Ltd. again did the work. An invoice was sent on May 2, 1990 to the builder in the amount of \$1,600 plus the 15% administrative charge of \$240 for a total of \$1,840.

This additional problem dealt with the flashing and shingles on the roof and Richters had attended to consider this particular matter since he was well experienced in that area. He noted that various tradesmen to do original work and repairs were indeed scarce through 1987 to mid 1989, particularly bricklayers. There were no complaints made by Jaques or Pingue to Richters with respect to any of the items that had been added to the various Conciliation Reports.

In Nielsen's cross-examination, he noted that this was the very first DeSoto claim and all were agreed that extra time

should be given to the builder to complete various items in order to help develop that builder's reputation. In his view, 30 days would do the necessary work since various trades were working on other properties just two or three doors away and the owner had to be satisfied.

#### PAGE RESIDENCE

A complaint letter was received on December 18, 1987 with respect to 59 items being outstanding after some had been done by the builder. Nielsen was given this file and did the conciliation inspection on May 26, 1988, at which time 14 items were said to be warranted. Vince Pingue was the builder's representative and no complaints were made with respect to those items.

The usual notice to the builder went on June 2, 1988 and the builder was given 45 days to complete the work with 14 days as a time frame in which to begin these repairs. On June 20, 1988, the owner noted that only some work had begun and, therefore, on June 28 a further letter was sent to DeSoto which announced that the work will be done otherwise at an estimate of \$3,000 plus the 15% administrative fee. By July 25, Page had sent in two further pages of outstanding items and Nielsen did a field inspection report on July 26, 1988. The builder was not invited and this report covered five pages of observations. Some items had been completed, while others had not or were not done well, and there were, in addition, new items.

The owner would no longer allow the builder in to the property and a Work Schedule was made up of some two and one-half pages, and a copy sent to DeSoto for information.

W.S. Walters Construction Limited was awarded the contract to do repairs on September 7, 1988 and work was done in the amount of \$5,425. An invoice for this amount, together with a 15% administrative cost in the amount of \$813.75 was sent to the builder on October 24, 1989 in a grand total of \$6,238.75.

Richters attended on a second conciliation on that property in order to clear up the file on August 23, 1989. A problem existed with a sliding patio door which had to be replaced, while three other items of complaint were not allowed. A Work Schedule was prepared on August 29, 1989, and on February 14, 1990, W.S. Walters Construction Limited completed the work.

On March 1, 1990, an invoice in the amount of \$1,800, together with the 15% administrative cost of \$270 was sent to the builder in the total amount of \$2,070.

On cross-examination, Nielsen explained that the builder had not been allowed into the property because of decisions made by Hart as Regional Manager and by the owner. There was apparently no rapport between the parties and co-operation was not possible since the service staff was not welcome. Nielsen acknowledged that there is no balancing of responsibilities between the owner and the builder in that the builder must complete the property in good and workmanlike manner in accordance with the Ontario Building Code although there are, of course, certain tolerances which can be allowed.

#### STEWART RESIDENCE

Possession of this property was taken on December 4, 1987 and the Certificate of Completion and Possession showed certain items outstanding. A further detailed list was sent to the New Home Warranty Program on February 11, 1988, and on August 13, there was a request for conciliation with respect to 16 items.

The conciliation inspection took place on September 27 with Jaques available for the builder at which time agreement was given to the 8 items that were placed on the warranted schedule. The leak in the family room ceiling and a fresh air vent required for the fireplace were examples of the items allowed. The usual letter with a copy of the Conciliation Report was sent to the builder on September 28 and 30 days were given to complete the work with commencement to occur within 10 days. On October 14, a second letter was sent with no response and an estimate of the value of work to be done was set out at \$1,900.

Boudreau Homes Ltd. did the Work Schedule "B" which Nielsen prepared and the work was done in the amount of \$2,725. After the addition of the usual 15% administrative fee in the amount of \$408.75, an invoice in the amount of \$3,133.75 dated January 19, 1989 was sent to the builder.

A second Work Schedule was prepared on October 27, 1988, with respect to certain fireplace bricks that had to be redone.

That work was done also by Boudreau Homes Ltd. in the amount of \$900 and an invoice was sent to the builder, including the usual 15% administrative fee of \$135 for a total of \$1,035. The invoice is dated April 11, 1989.

On cross-examination, Nielsen acknowledged that while Jaques did not agree, in fact, to each of the items in detail, his complaints or comments would have been influential and may have occasioned some changes. Where the owner is reasonable in these matters and an item is warranted, it must of course be repaired.

Nielsen acknowledged that the fireplace repairs had been done without the builder being informed as is the usual practice. He noted that the builder can appeal the Plan decision in these matters, in effect, only at the time of a revocation hearing.

#### JOON RESIDENCE

Mark was the conciliator for this property and outlined the review of the various items which were presented on behalf of the Program. A letter of complaint of February 23, 1988, set out some 20 items of which several were major. The Warranty Program wrote to DeSoto on March 21 setting out a copy of the letter and requesting that these items be reviewed and corrected. A conciliation was sought on April 25 and an inspection occurred on May 18. Vince Pingue and Frank Aquino were present for the builder and 25 items were placed on the "A(1)" Schedule with no objections from them. Eight items were placed on the "A(2)" Schedule.

The major items involved in this property dealt with leaks in the dinette bay window, certain floor ceramic tiles cracked and bridging under the floor needed and the basement stair not built properly with risers not being equal.

Again the usual letter was sent out with a copy of the Conciliation Report on May 27, 1988 and the builder was given 45 days to complete the work with the requirement that it be commenced within 14 days. Some work was done but not all.

On July 6, a further letter was sent out setting an estimate in the amount of \$1,850. W.S. Walters Construction Limited presented an estimate with respect to the Work Schedule on September 17 and did the work involved in the amount of \$4,835, together with extra work required to repair floor joists in the amount of \$2,700. This total was, in fact, cash settled with the owner by the Program in the amount of \$7,425. An invoice dated October 11, 1988 was sent to the builder in that amount plus an 15% administrative cost in the amount of \$1,113.75 for a total of \$8,538.75.

#### MOSSEY RESIDENCE

Mark was the conciliator in this file which began with a six-page complaint letter received April 11, 1988 by the Program. A copy of this was sent on to the builder the next day with the usual letter to request review and corrections. A conciliation was sought on July 14, 1988 which was done on August 30 with Jaques representing the builder.

Twenty-four items were included on the warranted schedule



with the comments that brickwork was very poorly done and 20 specific areas noted concerning that matter. In addition, interior drywall repairs were needed in 11 areas in the home. A Work Schedule "B" was prepared on August 30, 1988 and estimates were sought.

W.S. Walters Construction Limited gave an estimate to repair the necessary work in the amount of \$16,165. Bestway Lumber and Renovation Centre quoted \$3,370 for the various internal items, excluding the brickwork.

In the event, the job was split and Bestway Lumber completed three particular areas. The first payment made to Bestway was for \$850 and an invoice including a 15% administrative fee in the amount of \$127.50 was sent on March 28, 1989 to the builder in the total amount of \$977.50. A second payment of \$1,830 saw an invoice to which \$274.50 had been added as an administrative fee cost for a total of \$2,104.50 which was sent to the builder on March 28, 1989. A third invoice for \$420 plus an administrative cost of \$62.75 was sent to the builder on March 24, 1989 in the total amount of \$482.75.

D & M Construction were awarded a contract to replace the brick for this home at a cost of \$36,220. This amount was to cover the removal and disposal of the removed brick, together with the re-bricking and the necessary landscaping. An administrative cost of 15% in the amount of \$5,433 was added to this total for an invoice sent to the builder on October 19, 1989 in the amount of \$41,653. The total job here was done as a result of Hart's decision after the Beaird property had been re-bricked. The price of the home originally was \$106,000.

On cross-examination, Mark acknowledged that this occurred after the Beaird property and that no further notice was given to the builder with respect to the tearing down of all brick instead of doing some repairs since the builder had, in fact, done nothing at the property. The brick area here was in worse condition then the Beaird property so the decision was made to completely redo the bricking in order to satisfy the owner.

In his evidence, Hart noted that there were 20 areas of brickwork to be completed and while repair was set out to be in the amount of \$7,050 originally, the re-bricking total cost, in fact, was \$36,220. He did not visit the property, but was influenced by the report of Mark and by the situation for the Beaird property.

BEMTIVOGLIO RESIDENCE

A letter of complaint was received on October 25, 1988 by the Program with a request for conciliation. A copy of the letter went to the builder on November 8, 1988 with the usual request to review and correct the outstanding items. Mark attended on the conciliation inspection on January 11, 1989 with Eric Jones appearing for the builder and making no objections with respect to the 23 Schedule "A(1)" items which were listed. These items included brickwork, grading, painting and carpet and there were, in addition, a further 27 items on the Schedule "A(2)".

The usual letter went to the builder with the Conciliation Report on January 18, 1989 and the builder was given 20 days to complete the work and was required to commence the repairs within 10 days. Nineteen items were not completed and a second letter went to the builder on March 2, 1989 setting out an estimate of \$8,100 to do the work.

A Work Schedule "B" was prepared by Mark and both W.S. Walters Construction Ltd. and Bestway Lumber were asked to bid on the contract.

Walters did submit a bid in the amount of \$10,760 which was accepted. The claim was, in fact, settled for cash with the owner on May 10, 1989 in that amount.

An invoice was sent to the builder on May 24, 1989 for that amount, together with the usual administrative cost in the amount of \$1,614. for a grand total of \$12,374.

In cross-examination, Mark noted that there was no argument or questioning or disagreement made by the builder's representative on the conciliation. An extra two weeks was given to do the repairs, but access was finally denied on March 7. At the conciliation, the option of cash settlement is mentioned and the owner knows that monies could be received rather than the work done. On March 2, 1989, the final letter was sent out. At that point, the builder is effectively removed from the situation since the Home Warranty Program will not force access and bidding with respect to estimates for the Work Schedules has begun.

BAINS RESIDENCE

Letters were received from the solicitors for Bains and Mark was given this file to resolve the claims that had been made. On September 30, 1988 a basement water leak was complained of and the repairs were not satisfactory. As well, there were questions raised with respect to sod for the property. On November 7, a



further letter set out that no response had been received from the builder.

On March 6, 1989, the Program sent to DeSoto a copy of the complaint letter with the request that the items therein be reviewed and corrected. A conciliation inspection occurred on June 13, 1989 with no representative from the builder. On June 16, the usual letter was sent with the Conciliation Report requiring the work to be completed in 30 days and the repairs to be commenced within 10 days. Seventeen items were included in the warranted Schedule, including the water leak, the matter of the sod and other minor items.

Mark completed a Work Schedule "B" and saw three estimates on July 12, 1989. Boudreau Homes Ltd. bid on the work in the amount of \$4,325 and the other two estimates were \$6,665 and \$8,089. Boudreau did the work and an invoice was sent to the builder on September 25, 1989 covering the \$4,325 paid, together with the 15% administrative fee in the amount of \$648.75, for a grand total of \$4,973.75.

In cross-examination, Mark noted that the builder had received a telephone call and was sent a letter in this claim, but no representative was present. Of the 70 DeSoto conciliations that he did, there were perhaps 10 that were without a representative for a builder. Where the builder's representative is present, the particular problems raised can be seen and, of course, they will have already been set out in a letter of complaint to the builder or by discussions between the homeowner and the builder's service representative since possession had been taken by the owners. The builder can encourage these matters to be resolved by a prompt fixing of various minor items either at little cost or perhaps no cost, if tradesmen are brought back in to do the work which should have been done in the first place.

The evidence of Milligan who inspected the various homes in this area was that the problems got worse and that there was much review with the various site supervisors of whom there were eight within two years. He said that he had never seen more framing crews without knowledge to do the work and many other tradesmen who were unknown to him. With respect to framing, one of the homes framed had been wired and all the wiring had to be replaced and, indeed, another property even had the plumbing taken out in order for proper reframing to be done. While the heating and foundation crews which DeSoto used were good, there were problems with many DeSoto homes. He noted that while many tradesmen were not qualified to do all of the tasks at that very busy time in mid-1988, the work done by DeSoto was generally better as the teams were organized and became more experienced. In any

event, the responsibility throughout these matters is that of the builder and being new or not having proper trades or completing their supervision is no excuse in Milligan's view.

#### BEAIRD RESIDENCE

A five-page letter of complaint was received by the Program on June 21, 1988 and a request for conciliation was received on July 11. Mark attended to do the conciliation inspection on August 11 with Vince Pingué being present for the builder and offering no objections to the various items which were said to be warranted.

Twenty items on the "A(1)" Schedule and 15 items on the "A(2)" Schedule were decided upon, together with 2 further ones as being beyond the jurisdiction of the Program. The items included brickwork in which 16 areas were identified and a requirement for certain bridging under the kitchen floor, together with other routine items.

On August 19, 1988, the usual letter was sent to the builder with a copy of the Conciliation Report and 45 days were given to complete the work with commencement to occur within 14 days. No objections were made to the various items set out in the Conciliation Report by the builder.

A second letter went to the builder setting out a \$4,500 estimate which would be a responsibility of the builder should the work be otherwise done. On October 26, 1988, the owner wrote to the Program to the effect that the builder was trying to do some repairs, but in fact some items had been made worse. The Regional Manager Hart visited the property and wrote to DeSoto on November 10, 1988 as follows:

November 10, 1988

Ref: #13-600(12699)

DeSoto Developments Ltd.  
3390 South Service Road  
Burlington, Ontario  
L7N 3J5

Dear Sirs:

RE: BEAIRD RESIDENCE, 127 NORTHWOOD DRIVE, WELLAND, ONTARIO

On November 8, 1988, I accompanied our Mr. Mark Roccatagliata to re-inspect the brickwork at the above

residence after your bricklayer had carried out certain repairs.

My immediate impression on seeing the overall brick job was that it was unacceptable, and it was Mark's opinion that the repair job was, in many areas, worse than the original. The areas that had been patched were extremely dirty and smeared with mortar and there were numerous vertical mortar joints that were wider than the maximum allowed in the Ontario Building Code.

I agreed, during our telephone conversation, that the brick is a very rugged type with a certain lack of uniformity in its profile, but even that type of brick must be laid properly and within a certain tolerance of workmanship.

It is the decision of the Warranty Program that the only way to ensure an acceptable brick job on that house is to remove all of the bricks and re-brick the house. Consequently, a revised Work Schedule is being prepared, to include the brick job and some of the remaining items inside that have not been completed by your company. The work schedule will be given to a contractor of our choice to have the work done on your behalf.

You have said that you will approach the owners with the possibility of buying the house back from them and selling them a new one. You are entitled to do this, of course, but they have been advised that the Warranty Program is taking over the responsibility of repairs if your negotiations with them should fail.

Yours truly,  
ONTARIO NEW HOME WARRANTY PROGRAM

W. Robert Hart  
Regional Manager  
WRH/dc

On November 17, 1988, a reply was sent to that letter:

DeSOTO DEVELOPMENTS LIMITED  
3390 South Service Road  
Burlington, Ontario L7N 3j5  
(416)333-4411

November 17th, 1988.

Mr. W. Robert Hart,  
Regional Manager,  
Ontario New Home Warranty Program,  
883 Upper Wentworth St., Suite 204  
HAMILTON, Ontario  
L9A 4Y6

Dear Sirs:     Re:   Beaird Residence, 127 Northwood Drive  
                    Welland, Ontario Ref: 13-600 (12699)

I wish to confirm receipt of your letter dated November 10th, 1988. I am hereby notifying you that I wish to appeal the decision by the Ontario New Home Warranty Program to have this house completely re-bricked.

Yours cooperation in this matter would be greatly appreciated.

Yours truly,

DESOTO DEVELOPMENTS LIMITED

Larry Paletta.

LP/ljs

A further letter from the Regional Manager was sent on November 28 as follows:

November 28, 1988

Ref: #13-600(12699)

DeSoto Developments Ltd.  
3390 South Service Road  
Burlington, Ontario  
L7N 3J5

Dear Sir:

RE: BEAIRD RESIDENCE, 127 Northwood Drive, Welland, Ontario

Your letter dated November 17, 1988 is acknowledged.

The appeal process by a builder against a decision of the Ontario New Home Warranty Program does not start until after the work has been completed by the Ontario New Home Warranty Program. An invoice is delivered to the builder and if he fails to reimburse the Ontario New Home Warranty Program a proposal to Revoke Registration is issued.

It is the Registrar's Proposal to Revoke that can be appealed.

Yours truly,  
ONTARIO NEW HOME WARRANTY PROGRAM

W. Robert Hart  
Regional Manager  
WRH/cb

An estimate was received from Bestway Lumber on the understanding of a full re-bricking to occur so that various items could otherwise be fully repaired and leaks stopped when the bricks had been removed. A Work Schedule "B" was completed by Mark for some items on January 17, 1989.

In the result, Bestway completed the following work and the following invoices were sent:

16 February '89	\$2,705 + \$405.75 administrative cost = \$3,110.75
6 April '89	\$ 710 + \$121.50 administrative cost = \$ 931.50
28 March '89	\$ 510 + \$100.00 administrative cost = \$ 610.00

W.S. Walters Construction Limited completed an estimate with respect to the re-bricking on May 4, 1989 in the amount of \$30,000. Rossi & Expert submitted an estimate in the amount of \$35,000.

Bestway attended to certain other repairs to a value of \$2,924.57 and an invoice including a 15% administrative fee of \$438.68, to a total amount of \$3,363.25 was sent to the builder on September 13, 1989. In addition, there was a cash settlement with



the owner in the amount \$450 for certain items and an invoice, including an administrative fee of \$67.50 for a total of \$517.50 was sent to the builder on October 16, 1989.

The brickwork was completed and an invoice was sent to the builder on October 10, 1989 for \$30,000, plus a \$4,500 administrative fee for a grand total of \$34,500.

In addition, certain other repairs to windows were completed by Bestway in the amount of \$1,876.92 and an invoice including the 15% administrative fee in the amount of \$281.53 was sent to the builder on November 24, 1989 in a total amount of \$2,158.45.

On cross-examination, Mark noted that the purchase price of the home was \$122,744 including the lot. He stated that if the builder is unhappy with any of the items at the time of the conciliation inspection or which form part of the Conciliation Report, then the builder should respond but there was no response made in this claim.

No photos were prepared although they usually are for major structural defects such as this because in this instance, Paletta saw the scene of the property and was familiar with the details. Mark noted that if a matter is warrantable, the actual price is not considered nor the effect of such extensive repairs as in this case on the total value and the cost which those repairs would incur. In this instance, the builder did complete perhaps 10 items excluding the brickwork and certain of the work done, in fact, worsened the situation.

In Mark's view, the builder disagreed with the solution but did not disagree with the problem that was caused by the bricks and the brickwork in this property.

Evidence given by Hart noted that 45 days were given to the builder to do the repair work instead of the usual 30 days since all trades were very busy at this time. He attended the reinspection on November 8 and reviewed with the Tribunal the sequence with respect to events such as this. After the conciliation, and the opportunity for the builder to comment upon the terms in the conciliation, there is an estimate for a Work Schedule or a cash settlement that is prepared only when no work is done or where poor repairs have been attempted. Once payment is made an invoice is sent and if it is not paid, that fact forms part of any proposal to revoke a registration at a hearing before this Tribunal.



KRATINA RESIDENCE

Possession of this property was taken by the owners in November of 1988 and a letter with 18 complaints and a request for conciliation was received by the Program on February 1, 1989. A copy of that letter was sent to DeSoto on February 2 with the usual request to review and correct the various items complained about. Price was given this file to resolve and a conciliation inspection occurred on March 30, 1989. A copy of the report went to DeSoto on April 3 and a representative for the builder at the conciliation was Mr. E. Jones.

There were 12 warranted items, together with 11 further items agreed to from another letter of March 21 sent to the builder the previous week. These items included the squeaking of all floors and stairs, a basement leak, and certain problems with drywall joints and painting.

On June 9, a second conciliation inspection occurred with Messrs. Finnochio and Annet attending on behalf of the builder. The builder was given 30 days to complete outstanding items with 10 days in which repairs should begin as set out in the letter to the builder on June 14. There were 9 items which came from the further letter of March 21 and no work had been done since the first conciliation for some items while unsatisfactory repairs for 4 others were listed.

On June 14, a quotation was sought from Boudreau Homes Ltd. on a Work Schedule "B" which Price prepared. A seven day extension was allowed and some items were completed in accordance with the agreement of the owner. A brief reinspection occurred on July 27 with Biegel representing the builder. On August 3, a letter set out the details of that inspection and noted that the Kratinas were prepared to accept \$15,000.

The estimate from Boudreau for the items in the first conciliation inspection amounted to \$6,350, together with \$4,850 for the items from the second inspection, as well as the unknown cost to repair certain basement leaks. Mr36 s. Kratina wrote to Premier Peterson on August 8, 1989 outlining her frustrations in this matter and later agreed to a series of cash settlements.

On August 16, 1989, a cash settlement for \$4,850 was paid over to the owner and an invoice on November 1, 1989 was sent to the builder for that amount plus an 15% administrative fee cost of \$727.50 for a total of \$5,577.50. Boudreau was asked to bid on the matters of certain basement leaks and exterior brickwork repairs on June 9, 1989. \$6,500 was agreed to as the cost of this

work and it was paid, and accordingly an invoice was sent to the builder on December 14, 1989 in that amount plus the 15% administrative cost of \$975 for a total of \$7,475.

On October 26, Boudreau was asked to bid on certain roof repairs on flashing and in the result, a cash settlement for \$400 was given to the owner. By invoice dated December 5, 1989, that amount together with an administrative fee of \$100 was included in an invoice totalling \$500.

On February 13, 1990, a brief reinspection occurred concerning the depth of certain insulation in the roof area and a resultant wavy drywall ceiling which had developed. That claim was cash settled in the amount of \$200 and an invoice was sent to the builder on February 23, 1990 in that amount, plus an administrative charge of \$30 for a total of \$230.

In the Spring of 1990, two basement leaks were fixed by Boudreau for an amount of \$1,600. An invoice was sent on March 1, 1990 in that amount plus an administrative cost of \$240 for a total of \$1,840.

Allick noted in his evidence that he visited this property with Hart and it was one of nine that had particular problems. He stated that he could not believe things were as bad as his inspectors said. However, on his visit, he found that in fact they were. There were structural disabilities and a general lack of supervision. An Order to Comply was issued for this property on February 1, 1989 and a second one on March 17 when it was found that four joists had not been put into the framing. In Allick's view, DeSoto certainly is a problem builder.

#### JOHNSTON RESIDENCE

The Certificate of Completion and Possession in this property set out the date of possession to be June 29, 1988 and had a list of certain items to be completed. A letter went to the New Home Warranty Program on September 20, 1988 and on October 4, a copy of that letter was sent to DeSoto with the usual request to review and correct the outstanding claims. Since the items were not attended to, a conciliation inspection was done by Price on April 6, 1989 and E. Jones was present for the builder. There were 17 items placed on the "A(1)" list and 9 items on the "A(2)" list. The warranted items included a crowned floor on the second level, certain basement leaks and repairs required to the kitchen vinyl floor among other items. No contact was made by the builder and no repair work was done so a Work Schedule "B" was prepared by Price with the estimates. A cash settlement of \$5,200 was agreed to by the owners since the items were all quite clear and quite

small. An invoice in that amount together with an administrative cost of \$780 was sent to the builder on June 13, 1989 in the total amount of \$5,980.

In cross-examination, Price acknowledged that he can do estimates as can the other inspectors in the \$2-\$3,000 limit, whereas the Regional Manager Hart can approve settlements of up to \$10,000. In this case, the builder's representative was aware of the variety of items, even though no photographs were taken and the options of repair or cash settlement were discussed with the builder's representative according to the evidence of Price.

#### WEBER RESIDENCE

Possession was taken of this property by the owners on December 15, 1987 and a list of 33 items of complaint was sent on April 11, 1988 to the builder with a copy to the Program. Price was given this file to administer and following a conciliation request of September 5 and advice that some items had been attended to, but that recent action had not taken place as of November 16, a conciliation inspection was arranged for January 17, 1989. The builder was represented by E. Jones and 12 items were placed on the "A(1)" warranted list. These included brickwork and caulking and exterior painting, together with squeaky floors and certain water leaks due to faulty roof flashing.

On January 20, 1989, the usual letter was sent to the builder with a copy of the Conciliation Report requesting these matters be completed within 30 days and the work to commence within 10 days. A few of the items were attended to and on April 6, 1989 a further letter with added items was received. A reinspection was arranged for April 6, but the builder was not represented. All of the outstanding items were to be done by April 30 and a copy of the further report went to the builder on April 7 with again the 30 days to complete the work and 10 days to commence it set out. Some of the items were done.

On May 17, Boudreau Homes Ltd. was asked to quote on a Work Schedule "B" which Price prepared. The submitted price of \$6,775 was approved and the work was done.

An invoice was sent to the builder on July 19, 1989 in the amount of \$6,775, together with the usual 15% administrative cost of \$1,016.25 for a grand total of \$7,791.25.

On July 31, 1989, there was a further complaint with respect to basement water leaks in a letter sent to DeSoto with a copy to the Program. A further conciliation inspection occurred on September 1, 1989 with B. Wood and Ms. A. Hoffman attending on

behalf of the builder. The Conciliation Report was sent to the builder on September 18 with a note that the builder is willing to repair both the window wells that were not draining properly. Boudreau Homes Ltd. bid \$1,300 to complete the work and charged an additional \$300 to seal a planter for a total of \$1,600. While no invoice was presented in evidence with respect to this matter, apparently the Plan has assessed the builder \$1,600, together with a 15% administrative cost of \$240 for a total of \$1,840.

### The Program's View of DeSoto

Hart discussed the general building record of DeSoto and referred the Tribunal to the consumer's guide which sets out the various categories. One conciliation in 25 registered properties is allowed without any penalty and that forms the standard for the average builder. If, however, 100 homes are built, the builder would be charged amounts that might arise upon a fifth conciliation in that total. One chargeable conciliation in 75 properties would be an excellent record. An average of 1 conciliation in 50 properties would put the builder in the "above average" category.

DeSoto had 46 chargeable conciliations out of 106 properties in one area and 73 out of 142 properties in another for an average rate of about 50% chargeable conciliations for the homes which were being constructed. In Hart's view, the operation of this builder showed carelessness and lack of consideration, together with poor after sales service.

Throughout these various examples, the builder had received the complaints over a period of a year or so and was given the opportunity to be present at a conciliation through a representative to review particular items when the matters reached that stage. A copy of the Conciliation Report would then be sent to the builder in the usual form and procedure which would allow for an additional opportunity to comment on matters that were not accepted by the builder. It is only after the passage of up to two years and the inability or unwillingness of the builder to complete the various items which have been seen to be warranted that the bidding procedure developed through the creation of a Work Schedule. Eventually the builder is invoiced for the cost to which the Program has been put, together with the 15% administrative fee.

Even if repairs appear to be much out of line because of their cost considering the value of the property, it is Hart's opinion that the repairs must be attended to because they are required by the Ontario Building Code in that the property should be constructed in a good and workmanlike manner. As to cash settlements, the builder could, of course, have the work done much more cheaply and quickly either by service staff or by recalling



certain trades responsible for inadequate work in the first place. If the builder does not attend to those matters, then in Hart's view, the builder has lost any right to complain as to the amount of cash settlement or the amount which is included in the invoice that becomes the builder's responsibility to pay.

### Evidence on behalf of the Appellant

As a witness called by counsel for the registrant builder, Nielsen gave an overview of his experience with recent homes built in Ancaster. Four were visited in order to assist the builder before problems developed. Nine visits were made to one property and four to another in the period from November 23, 1988 to April 26, 1989. A third property was visited only once on February 6, 1989 and the fourth property was sold so that no details of visits were kept by Nielsen.

Nielsen agreed that this was preventive medicine because of the horrendous past experience with DeSoto. Suggestions were made to Jaques and were accepted, and the Tribunal notes that these houses were apparently more expensive and had some fewer concerns than those 14 which were discussed at this hearing.

Richters, in his further evidence, also stated that there appear to be fewer complaints in the Ancaster area which he has not personally visited. However, since only one home is finished, it is too soon to be certain of any improved quality standards.

Smith had some DeSoto homes listed for sale. In May 1988, he was asked to visit the Beaird home to offer a buy-back from DeSoto. After two visits without making contact, Larry Paletta told him not to bother since a claim was being made to the Program.

In his visit, he noted that while the brickwork was uneven and the look might affect the resale value, it was not too bad. He saw nothing wrong on three walls of the house. He acknowledged that he is not a builder, an expert on bricks or an appraiser.

Schuster gave evidence of completing certain particular items in the Bentivoglio home and showed check marks on the third page of Exhibit 56, together with an apparent signature by Mrs. Bentivoglio showing items completed.

He also recalled doing certain repairs in the Mossey home, but on a second review did not accurately recall just which ones were done. He had not maintained any personal records, nor were the work slips provided by the builder an accurate reflection

of all the work that may have been done. In his view, it was not worth the cost to tear off and then replace all of the Mossey brickwork.

Wood acted as a builder's representative on some conciliations and went with Ms. Hoffman on the second conciliation of the Weber property when the extra window well was required to be installed.

The Tribunal accepted his evidence that repairs to the north window well were done by a hand auger in a day; and that access to the second one installed by the owner was denied due to the prospect of disturbance of some rose bushes.

While the builder had no duty to repair that window well, the Program held the builder to a voluntary offer and then billed some \$800 after access was denied and the work had to be completed by another.

In reference to the evidence given by Wood, the Tribunal believes that this procedure was unfair and accordingly will deduct that \$800, together with an administrative fee of \$120 from the Weber claim.

Monaco completed tile repair work at the Montgomery home and said that Mrs. Montgomery was happy with the result. He did not do the initial tile work, and did not know of any subsequent complaints.

A price reduction was given to Silvestri on closing, but complaints were made anyways and the Program eventually paid. Jaques was with DeSoto for three years from June 1987 to June 1990, and he represented the builder at the Silvestri conciliation. Many items there were minor and cosmetic, however, since such complaints were routinely accepted by the Program, he was instructed to fix them and not object since the items were presumed to be warrantable. With many minor items, Jaques would cash settle with owners and resolved 20 to 30 percent of the files in that way. As a construction estimator, he thought that the price per item on Work Schedule "B" given was within a reasonable range so that the eventual total was a "ball-park" figure of costs that were acceptable.

As a builder's representative for the Mossey claim, he did not object to adding soffit dents to the "A(1)" warrantable list, although the repair crew eventually could not find them to fix them later. While he noted that a builder could do any repair work cheaper than another contractor, he agreed that if the work



was done well in the first place there would not be all this difficulty.

After reviewing the sequence of events of an ordinary file and noting that two years may have gone from Possession to repairs, he stated that continuity of staff was the major difficulty for DeSoto. Ten supervisors and customer service people went through the scene in the three years that he was employed, which was very stressful for all in trying to complete various projects. In his view, much improvement had occurred over these years and he saw Paletta as a fair man trying to put out a good product.

The evidence of the other nine general witnesses for the registrant can be summarized as follows:

Manuel Caamamo is a bricklayer,  
Steve Cuhelj is a carpenter,  
Michael Zawoyski is a businessman, and  
John Varasso works at Stelco.

Each bought a house from DeSoto and each is content with his home noting that any problems which did occur were taken care of promptly.

Edwin Van der Windt is a building inspector in Ancaster and noted that one of ten homes under construction there has now been completed. There have been no unusual problems and the workmanship is satisfactory. Construction began on this group in the Fall of 1988 and went on until the Spring of 1990. Nothing has gone on for five months and winter safety measures for the uncompleted houses at their various stages of construction is now being planned.

Blair Cerello dealt with after sales service and clients' complaints for some four months from March to June, 1990. He is a second year student at the University of Guelph. He had no involvement in any of the 14 claims brought before the Tribunal in evidence. In his view, newer homes had fewer complaints than earlier ones.

A review of correspondence concerning 8 properties showed problems of access and Cerello's attendance at various conciliations. He recalled attending from 6 to 20 conciliations in his brief time with DeSoto. Neither he nor Van der Windt were aware that a claim has been made to the New Home Warranty Program with respect to the one house that has been completed in the Ancaster group.

Paul Biegel was a service manager with DeSoto for less than three months in the summer of 1989. He is an experienced builder of custom homes in Western Canada. In his view, access was a problem for repair workers. He cited the Kratina property where Gary Price had to tell the owners that access must be given. He saw a marked improvement in quality from the Fort Erie and Welland projects to the Ancaster one. He was involved with from 6 to 12 conciliations in his three months with DeSoto.

Maureen Guy is the Director of Communication for the New Home Warranty Program at the head office in North York. She was asked about a News Release of August 29, 1990 which referred to the Order on the adjournment of this hearing made after July 13. She had no personal knowledge of the Proposals to Revoke Registration. As the author of the Consumer's Guide to the 7,000 builders registered with the Plan and their standards, she noted that DeSoto was in the "below average" category.

Jim Fawcett has had 20 years of experience in building footings and foundations for houses. For four and one-half years, he has run a crew for DeSoto and finds quality to have improved over the years. He explained the reasons for soil clogging of the weeping tiles at the Kratina and Mossey properties and noted that a covering "sock" is now used as a mesh to block soil particles from entering the tiles.

Larry Paletta reviewed his business history for the Tribunal. By 1984, he had sold out a very successful meat-packing business in Hamilton which he had built up over 33 years. DeSoto Developments Limited (DeSoto) was organized in April 1985 by him and by Renzo Leonardi who was a builder.

Ninety-four lots were purchased and the first four model homes were begun in October. They were finished in March 1986 and one was sold. Leonardi decided to leave the business, but Paletta decided to continue since he thought he could learn the business and produce a nice home in the 2,000 to 2,500 square foot range. Twenty-five were sold by April and then 15 more. Good tradespeople were scarce in these prosperous times, but as he learned the business, he began to develop his own crews starting with Fawcett and the foundation crew for which he bought a blade-caterpillar tractor, an excavator and two sets of foundation forms.

He then arranged to buy out some 800 lots in six subdivisions from Frank Silvestri. These included 29 in Grimsby, 107 in Ancaster, 138 in Welland, 56 townhouses in Stoney Creek and 99 in Novaco. There was an option for 300 lots in Fort Erie. The first completed house sold on June 6, 1986. By August, Paletta had decided not to sell out at a profit on his lots, but rather to

build up crews, employ workers and build good houses. Pingue came on staff in late 1986 and the Fort Erie, Stoney Creek, Grimsby, Novaco projects were all were underway. Two million bricks were bought to guarantee supply. Bricklayers came at increasing prices and four supervisors were hired. Jaques, Merna Morris and Eric Jones all began in 1987 to work for DeSoto.

By early 1988, there was much contact with the New Home Warranty Program. The "Montgomery" property was the first major problem. A review of the files presented to the Tribunal took place in early 1990 with all of the staff members present and an attempt was made to estimate prices for the work which should have been done or which was required on the various properties. However, there was no particular success in coming to a total list.

Paletta instructed his supervisors and workers to do extra work where possible and to resolve consumer complaints. A meeting was arranged with Hart for Paletta to present his five service persons and show their experience, but Hart was not impressed.

Through 1989, Wood covered service calls. Pressure from the Program and unhappy buyers led to low morale among employees. Paletta stated that he felt subject to a vendetta with unfair treatment by Program inspectors and generous settlements paid out which led by comment in the subdivisions to more claims.

While service improved since 1988, management problems continued. In the Ancaster development, better footings and foundations were routinely built then had been done earlier.

Conciliation rulings through 1989 were generally unfair, in Paletta's opinion. In March 1990, Cerello was hired and reputable renovation contractors and service people were sought from Program references. Then these persons dropped out of bidding for work because of apparent conflict with future work prospects from the Program.

Paletta offered to suspend his registration and develop a form of blanket second mortgage to protect against any Program claims at \$5,000 or \$7,000 on each enrolled home, but the Program would not agree and eventually notice was received for the hearing which began on July 4, 1990.

Paletta claimed that the Program decisions on the Silvestri, Mossey and Beaird properties with their brick concerns were grossly unreasonable. After August 31, 1990, the News release of the Program outlining the consent order which followed the first

portion of this hearing harmed any future sales and only one house has been sold since then.

Paletta had his solicitor write on March 6, 1989 to the Program to dispute invoice amounts for five properties of which four were presented to the Tribunal (Joon, Rashid, Stewart, Silvestri). A further letter of March 30 gave details of each file and a follow-up letter of May 16 noted that no response had been received. Finally a letter was sent on September 27, 1989 noting no response to the earlier letters and adding 17 more complaints about invoices sent on other files.

Paletta has at present 30 houses under construction from the footing stage to 6 which are practically completed. He wishes to carry on as a builder. He would welcome assistance from the Program inspectors and has learned much about house building over the past five years.

On cross-examination, he acknowledged a profit on each house of from \$2,000 to \$5,000 and stated that while there were many delays on closing in 1987, matters were in fact improving. Further, he stated that every person that bought a home from DeSoto has seen an increase in the value of his or her property over the last several years from the price which was initially paid.

#### Closing Arguments by Counsel for the Program

In his closing argument, counsel for the Program noted that DeSoto had the worst record for chargeable conciliations of any builder since the New Home Warranty Program began in 1976. Some \$828,000 are owing for claims invoiced to DeSoto.

He noted that the three reasons for cancellation of registration are the record of breaches of warranty, the lack of sufficient technical competence and the failure to reimburse the Plan for monies invoiced. These are all set out in detail in the early pages of this decision. An Order is sought under Section 9(4) of the Act to direct the Registrar to carry out his Proposal and to set the total dollar amount of the 14 claims which were presented in evidence and order payment of that amount.

In reviewing the 14 claims, counsel noted that no rebuttal evidence for any claim was presented except for the Weber claim. Accordingly, he sought an Order to have those amounts paid. In his view, the evidence of Jaques proved DeSoto to be incompetent as Jaques attended on many conciliations, including 6 of the 14 brought before the Tribunal. Warranted items were to be replaced as Paletta instructed Jaques to do. The problem was known and real efforts after a conciliation were rarely made to remedy items. The



option of cash settlement was known to him and he used it often himself with owners. The continuity of repair work was broken by the great number of claims, by poor supervision on the building site and by many changes of staff.

The evidence in the Silvestri claim was highlighted by counsel for the Program to show a pattern of action. He stated that any defence was discredited by offers to cash settle on a "cost of repair" basis and a decision to abide by the "A(1)" list so no procedural unfairness occurred. Further, Paletta knew the steps which would be taken if the work was not done and the conciliation stage was reached about a year or more after possession by the owners. In counsel's view, the New Home Warranty Plan really did the after sales service for DeSoto.

Counsel for the Program noted that Paletta conceded both the record of breaches and the failure to indemnify. He also acknowledged technical incompetence with his placing of blame on scarce tradesmen, shortage of materials, unqualified staff, supervision burdens and unfair settlement claims after conciliations. Breaches of warranty here should be met by the payment of damages which must equal the necessary costs of repair and administration.

#### Closing Arguments by Counsel for the Appellant

Counsel for the registrant builder DeSoto had begun his evidence with an overview that many earlier problems which led to many conciliations in late 1988 and early 1989 were all now corrected. He said that many subsequent owner complaints were stimulated by the generous settlements ordered by the New Home Warranty Program so that an avalanche of claims has unfairly fallen on his client.

On the question of damages, counsel advanced the view that the builder should pay only what a reasonable owner would have spent on repairs and that since the value of most properties increased over these years, no one really suffered a loss of value. The Program has looked to repair to a full warranty level with no regard as to cost or the modest change to the value of a home which results from such a disproportionate spending of money on repairs.

Counsel for DeSoto referred the Tribunal to several reference texts and cases which reviewed the subject of damages and the manner in which they should be measured. And further, he noted that the silence of a builder's representative at an inspection should not be taken for consent to have repairs or other obligations assumed which will be of excessive cost.

In addition, he raised the issue of procedural fairness and claimed that the builder has a right of appeal under Section 16 of the statute and that the New Home Warranty Plan has an obligation to hear the builder and allow the builder a full measure of input into any decision that will eventually bind him as a person affected by the result. In the alternative, his view was that if the builder is not a person so affected, then the Plan is exercising a statutory power which requires a hearing with notice and the decision maker must be unbiased and even handed so that a neutral person should preside over such a decision process.

### Reply Argument by Counsel for the Program

In his argument, counsel for the Program noted that the quantum of damages which would be developed in each of the examples brought before the Tribunal was the dollar amount necessary to put the owner back into a proper setting of having a home completed in a good and workmanlike manner. Breaches of statutory warranty require a remedy which may not bear relation to any breach of contract damages. However, here in his view, the contract rights have merged on closing and this does not become an issue. The settlement of claims on a "time and material" basis, which the Program uses, is exactly the same as that used by Jaques to settle various claims directly with new home owners on behalf of his employer DeSoto.

### Decision

As to the measure of damages, the Tribunal notes that the Act is remedial consumer legislation and that a builder is expected to complete a new home in a good and workmanlike manner. The cost of this work is only one consideration as the comfort and enjoyment of the home are also important concerns in this situation. There is a statutory duty upon the builder to remedy items which are shown to be warranted after a conciliation inspection. In nearly every example of the 14 heard by this Tribunal in this hearing, the builder's representative has not complained of the list of items included in the inspection report under Schedule "A(1)". Further the builder has not responded to the covering letter sent with a copy of that inspection report which requires him to review and correct items and to reply as to any items with which there is disagreement.

Whether the eventual contracted cost or cash settlement after an estimate is thought to be too high by the builder or not, the Program has the obligation to get the work done or to pay an acceptable cash settlement to the owner in order to close the file. If the builder had done the work well in the first place or answered the complaints, or repaired matters after a Conciliation



Report, then the Program and the owner would both have been content. The legislation is in place to protect the new homebuyer and the builder had several opportunities to do what was required of him.

It is the builder's lack of effort or response which leads essentially to an invoice and he can hardly be heard to complain where the necessity of that pattern is a result of his own breach of contractual duty, no matter what the cost.

Where the owner accepts a cash settlement and then does not do the work outstanding, the builder may very well be annoyed. Often a home will then be sold to an unsuspecting buyer who may not know of the claim or settlement, or who may not be as particular as the first buyer. Regrettably, this Tribunal can not require the original owner to use the money received to do the work. That lack allows less than good quality homes to remain in the housing inventory in this Province where an unwary successor in the title takes on a burden. However, until the Act is amended, there is no power in this Tribunal to require repairs to be made from the monies which in fact are paid over upon a settlement.

Where a builder may well wish to appeal a conciliation award given to the benefit of the new homebuyer, he does not have the standing to do so under the current Act. The builder/vendor is not an included person or party under Sections 14 or 16 and his rights to a hearing appear under Section 9. The builder can only argue or complain about the facts which led to an eventual invoice which is likely unpaid upon a hearing such as this one that seeks revocation of his registration. The opportunity for arbitration exists under Section 17(4) of the Act with respect to the resolution of certain differences, but this has apparently never been used.

With respect to the question of procedural fairness, it is the view of this Tribunal that the builder has several opportunities to resolve outstanding issues before they come to the stage of receipt of an invoice. Items often appear on the Certificate of Completion and Possession which are to be remedied. Then a further letter is often received by a builder, a copy of which is sent to the New Home Warranty Program. This brings a second opportunity to repair outstanding deficiencies and a third opportunity arises when a conciliation inspection takes place.

Upon receipt of a copy of the Conciliation Report, the builder has the opportunity to comment upon obligations assessed to him with respect to any of the items. In addition, time is given to complete certain repairs and the builder is informed that if the work is not done, the Program plans to act and send out an

invoice. There, indeed, may even be a further opportunity to deal with the necessary repairs at the time that estimates are being sought and the work is either to be awarded to another contractor or a cash settlement is being offered based upon the Work Schedule "B" which has been costed. However, these proceedings must end sometime and the procedure is there, when and if the registration of a builder is challenged for the builder to comment upon the various chargeable conciliations which may be seen on the record.

On each of the invoices noted under the detailed review of the 14 examples of properties brought before this Tribunal, an administrative cost in the amount of 15% has been added to the cash settlement or contractual price where the work had been done. The Tribunal sought advice from counsel with respect to the authority to charge this administrative cost.

Counsel for the Program noted that the Tribunal is dealing with statutory breaches pursuant to Regulation 728 and sections 3 and 4 thereof. The registrant is obliged to do certain duties and the matter of indemnification for "any loss" is set out. Letters which go to the registrant state that invoices will be sent and in counsel's opinion, the time and effort spent by the New Home Warranty Program in the necessary administration is a loss. Further, in his view, a general figure of 15% is not out of line with normal administrative costs and the builder, of course, should have done the work so that he can avoid paying that fee.

Beyond the statute, it was noted that the Vendor/Builder Agreement is contractual and again, it refers to "any loss" under Item 4.4(2). Then as a third point, counsel for the Program referred the Tribunal to analogous comments in the decision of Mr. Justice Rosenberg in the York Condominium Corporation No. 528 and New Home Warranty Program (1989) CRAT Vol.19, p.162. In his view, interest was added in this case because it was sensible to do so and, therefore, these administrative costs are equally sensible.

The Tribunal is prepared to accept the administrative costs as being a reasonable figure at the rate of 15% and as being a necessary addition to the various invoices which are submitted to builders. However, we would encourage the Program to ensure that this administrative burden is clearly set out in the documents which are provided both in the Vendor/Builder Agreement and in the individual guarantee that is required of builders. The 15% reference should also appear in any of the Renewal of Registration forms so that within the next several years, every registered builder will know that there is a clear obligation to accept this additional cost and this matter will be settled once and for all. The New Home Warranty Corporation may make certain by-laws under

Section 23 of the Act and we would encourage it to do so under Section 23(1)(f) of the Act.

The Tribunal has some concerns about the lack of photographs and other useful evidence with respect to the major work done on the Mossey and Beaird properties and the re-bricking which occurred at substantial cost. It is the view of the Tribunal that good practice would require photographs to be prepared for possible use in evidence at a hearing wherever major costs are being undertaken and that a guideline of a \$5,000 item would be a useful mark for the Program to use as to deciding when photographs would be prepared or not.

Having regard to the evidence and argument which has been prepared before the Tribunal and in accordance with the powers of the Tribunal set out in Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out his Proposal to revoke the registration of DeSoto Developments Ltd. and the Tribunal further orders payment by DeSoto Developments Ltd. in the amount of \$221,139.80 to the Ontario New Home Warranty Program pursuant to the various claims as set out on the following table:

Enrolment No.	AMOUNT		ADMINISTRATIVE COST	TOTAL
	INVOICE DATE	PAID BY PROGRAM		
13-600-12724 ("Joon residence")	Oct.11/88	7,425.00	1,113.75	8,538.75
13-600-12702 ("Mossey residence")	Mar.28/89	850.00	127.50	977.50
	Mar.28/89	1,830.00	274.50	2,104.50
	Mar.24/89	420.00	62.75	482.75
	Oct.19/89	36,220.00	5,433.00	41,653.00
13-600-11773 ("Montgomery residence")	Mar.24/89	16,813.00	2,521.95	19,334.95
	Jul.13/89	832.95	124.95	957.89
	Nov.14/89	7,400.00	1,100.00	8,510.00
	May 2/90	1,600.00	240.00	1,840.00
13-600-12698 ("Page residence")	Oct.24/89	5,425.00	813.75	6,238.75
	Mar.1/90	1,800.00	270.00	2,070.00
13-600-12178 ("Bentivoglio residence")	May 24/89	10,760.00	1,614.00	12,374.00
13-600-12700 ("Weber residence")	Jul.19/89	6,775.00	1,016.25	7,791.25
	Oct. /89	1,600.00	240.00	1,840.00
	Adjustment	-800.00	-120.00	-920.00
13-600-11908 ("Johnston residence")	June 13/89	5,200.00	780.00	5,980.00
13-600-12699 ("Beaird residence")	Feb.16/89	2,705.00	405.75	3,110.75
	Apr. 6/89	710.00	121.50	931.50
	Mar.28/89	510.00	100.00	610.00
	Sept.13/89	2,924.57	438.68	3,363.25
	Sept.16/89	450.00	67.50	517.50
	Sept.10/89	30,000.00	4,500.00	34,500.00
	Nov.24/89	<u>1,876.92</u>	<u>281.53</u>	<u>2,158.45</u>
subtotals		143,327.44	21,537.36	164,864.80

12-1349-54353	Nov. 1/89	4,850.00	727.50	5,577.50
("Kratina residence")	Dec.14/89	6,500.00	975.00	7,475.00
	Dec. 5/89	400.00	100.00	500.00
	Feb.23/90	200.00	30.00	230.00
	Mar. 1/90	1,600.00	240.00	1,840.00
12-1349-46656	Sept.25/89	4,325.00	648.75	4,973.75
("Bains residence")				
12-1349-41473	Mar. 3/89	9,000.00	1,350.00	10,350.00
("Posthumus residence")				
12-1349-48224	Dec.22/88	4,000.00	600.00	4,600.00
("Rashid residence")				
12-1349-50135	Feb. 3/89	14,000.00	2,100.00	16,100.00
("Silvestri residence")	June 23/89	400.00	60.00	460.00
12-1349-50136	Jan.19/89	2,725.00	408.75	3,133.75
("Stewart residence")	Apr.11/89	<u>900.00</u>	<u>135.00</u>	<u>1,035.00</u>
		<u>\$192,227.44</u>	<u>\$28,912.36</u>	<u>\$221,139.80</u>



GIOVANNI AND GIUSEPPINA DIDIANO

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
D.H. MACFARLANE, Member

APPEARANCES:

MARIA IANNONE, as agent

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 27 November 1990

Toronto

REASONS FOR DECISION AND ORDER

The appeal with respect to this matter is based upon two issues. The first is that underneath the front and rear concrete porches of the house constructed at 116 Glen Hawthorne Blvd. in Mississauga are two cold cellars in which frost accumulates at the join between the ceiling and wall during the winter months. The second issue is based upon an unevenness of the two porches which causes ponding of water and which the Applicant considers to have an effect hazardous to the use of the porches and which may also have caused the seepage of water into the cold cellars.

Dealing with the accumulation of frost in the cold cellars, uncontradicted evidence was presented to the Tribunal that the cold cellars had been constructed in accordance with the Ontario Building Code which required a door to be placed on the entrance to such cold cellars and ventilation to be provided either by a window or by a separate vent.

Evidence was given to the Tribunal that a window was built into each of the cold cellars and that such windows were capable of being opened and were in compliance with the Ontario Building Code requirements. Evidence was further given that upon complaint of the homeowners, weather stripping was placed around the doors giving entrance to the cold cellars to further prevent moist air from within the house entering the cold cellars and condensing on the ceiling.

It was also pointed out to the Tribunal that the windows, while capable of being opened, were closed because the homeowners had installed a security system which would be activated if the windows were opened on any occasion. Such evidence indicated that the homeowners by their actions had created a situation whereby ventilation was no longer capable of being provided. Further evidence was given before the Tribunal that indicated that there was no specific leakage of water into the cold cellars, but that there was a general moisture resulting in condensation freezing at the corners of the ceiling and wall.

With respect, therefore, to the moisture problem in the cold cellars of the homes, the Tribunal is satisfied that those cellars were constructed "in a workmanlike manner...free from defects in material" and "were constructed in accordance with the Ontario Building Code" as provided in the Warranty under Section 13 of the Act.

With respect to the two porches, the homeowners complained of ponding of water on each of these porches. The evidence presented to the Tribunal was that there were some irregularities on each of the porches which resulted in a ponding of water to a degree. The builder himself in his evidence acknowledged that this was, in fact, correct.

There was also some concern as to the strength of the concrete porches and the possibility of water seeping into the cold cellars through the join between the bricks and the porches. There was no objection to this as not being a warranted claim. In fact, evidence was given that the City of Mississauga examined the porches and issued a work order to insert weep holes in the brick and to test for the strength of the concrete porches. Evidence was presented to the Tribunal that such weep holes were inserted, that caulking was placed around the base of the brick where it joined the porch and that the strength test of the concrete showed the concrete to be well above minimum requirements.

With respect to the ponding, evidence was presented to the Tribunal that there was some unevenness on both porches and that the builder, in order to alleviate the situation, machine ground the porches in several places to smooth out such irregularities which would cause ponding to occur. Photographs presented in evidence to the Tribunal clearly revealed an unsightly area on the front porch resembling a terrazzo effect under the windows on the front porch and along the west edge of the porch. A similar terrazzo patch was revealed in the middle of the rear porch.

There is no doubt that the visual presentation from the photographs indicates these patches to be unsightly and inconsistent with the concrete finish of the balance of each of the porches. In fact, the evidence of Mr. Hornblow, the building inspector for the City of Mississauga, was that the terrazzo patches which had resulted from the grinding of the porch surfaces were not visually attractive.

Argument was submitted by counsel for the Program that no claim had been made with respect to the workmanlike construction resulting in these unsightly patches until the matter came before the Tribunal and, therefore, was not within the one year warranty period specified under the Act.

In examining the claim made by the homeowners to the Program, received by the Program on October 31, 1989, within the one year warranty, the list of deficiencies included the following: "front and back porch to be reconstructed, cement uneven and water remaining in one area". Subsequently, on the request for conciliation dated November 23, 1989 and received by the Program on November 27, 1989 reference was made to the following deficiency: " front and back porch to be reconstructed, cement uneven and water remaining in one area". Evidence was given by the builder that re-grinding had taken place prior to the conciliation, which was held December 12, 1989, and that further re-grinding had taken place subsequent to that conciliation.

It is the view of the Tribunal that when corrective action is being taken, such corrective action must also be completed in a workmanlike manner. As indicated, the photographs filed in evidence and the oral testimony of witnesses before the Tribunal clearly indicated that this remedial work left a patchy and aesthetically unpleasing surface on both the front and rear porches.

While it is true the homeowners did not specifically raise a complaint with the Program as to the aesthetic appearance of the porches, in the view of the Tribunal they did raise concerns about the uneven surface which the builder attempted to rectify. It may very well be that the builder has sufficiently rectified the unevenness of the surface, but in doing so he has left an unsightly surface on both the front and rear porches. In the view of this Tribunal, therefore, the unsightly result of the builder's corrective action is subject to the warranty contained in Section 13 of the Act. The exclusions contained in Section 13(2) of the Act do not apply as these surface defects in workmanship were not accepted by the homeowner at the time of taking possession.

Pursuant to the authority, therefore, vested in it under Section 16(3) of the Act, the Tribunal hereby directs the Program to have the surfaces of the front and rear porches painted or resurfaced in a manner to cover the unsightly finish at a cost not exceeding \$500.00; in lieu of refinishing such surfaces, the Program is authorized to pay to the homeowners the sum of \$500.00.

PAUL E. DUBOIS

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

PAUL E. DUBOIS, appearing on his own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 11 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This was a claim with respect to first year matters warranted under the Ontario New Home Warranties Plan Act. Substantial difficulty was presented to the Tribunal from the fact that many of the claims being advanced by Mr. Dubois arose from oral variations of the written purchase agreement.

Remedies cannot be given by this Tribunal for such a claim. Included in this category are the failure to install a laundry chute, a frosted bathroom window, larger laundry room cupboards and the changing of walls in the basement. This left claims relating to the placement of vacuum cleaner outlets, substituted ceramic tiles in the kitchen, the outside post on the porch and the failure to put a step at the dining room door.

In fact, in the evidence given with respect to the dining room door, it became clear that the municipality's building code would not permit such a door to be located in the dining room. The builder proposed to change this door back into a window and, therefore, this is not a matter to be dealt with by this Tribunal. In any event, Mr. and Mrs. Dubois signed a release in respect of this item.

In respect to the placing of the vacuum outlets, evidence was given that Mr. Dubois or his wife established such locations and, therefore, there is no sustainable claim.



No claim can be permitted for the substitution of ceramic tiles. This leaves only the question of whether any claim can be supported for trim on the exterior post. There was no evidence of improper installation in regard to this item. Mr. Dubois' main complaint seemed to be that the post was wood-framed and not brick, but this is again based upon an oral representation upon which the Program and this Tribunal cannot act.

It appears from the evidence that originally, there were some 35 to 37 items claimed by Mr. Dubois. Through conciliation processes, through settlement documentation and through an actual cash payment by the Programme, the claims were reduced to those referred to in these reasons.

It is the view of this Tribunal that these remaining claims are not covered by the warranty under the Act.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claims of the Applicant.

DR. SLEEM FEROZE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
ALBERT LONGO, Member

APPEARANCES:

DR. SLEEM FEROZE, appearing on his own behalf

NETANUS RUTHERFORD, representing the Ontario New  
Home Warranty Program

DATE OF

HEARING: 26 July 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program, dated August 10, 1989, to disallow a number of claims of Dr. Sleem Feroze. In his letter of claim dated August 10, 1989, Dr. Feroze asked that the Ontario New Home Warranty Program make the following payments, based on poor workmanship (Section 13(1) of the New Home Warranties Plan Act):

- |    |  |    |        |
|----|--|----|--------|
| 1) | For payment to Applebee Smith to<br>install return air in basement   | \$ | 110.00 |
|    | For Payment to Applebee Smith Limited<br>to connect two basement return air<br>grills and to return air ducts as<br>required |    | 160.00 |
| 2) | For payment to Desi's Aluminum Limited<br>for installation of down pipe  |    | 175.00 |
| 3) | For sanding and painting of railing with<br>trim clad  |    | 500.00 |
| 4) | For removal of earth from behind the steps<br>and from beneath the patio in the east side<br>and disposal                    |    | 600.00 |

5)	For removal of earth from the entire area beneath the patio and rebuilding of the patio completely	6,150.00
6)	For temporary repairs to patio carried out by Reli-A-Craft	609.00
7)	For time spent for telephone calls, correspondence, two inspections and appeal hearing, the expense of losing work	6,000.00
TOTAL:		<u>14,304.00</u>

The Ontario New Home Warranty Program denied all of the above claims stating that none constituted a major structural defect. Under Section 13(4) of the Ontario New Home Warranties Plan Act, all claims, except for those based on a major structural defect, must be made within one year after the warranty takes effect. Dr. Feroze's claims were all made more than one year after the warranty took effect.

At the outset, the Tribunal told Dr. Feroze that his claim for \$6,000.00 to repay him for time spent for telephone calls, correspondence, two inspections and appeal hearing, and the expense of losing work was not permissible; claims of this nature are specifically excluded by Section 6(6) of the regulations which states: "Liability under Subsection 3 or 4 is limited to damage to the home only..."

Dr. Feroze, representing his wife, the owner of the home, and himself was the first to testify. He stated that she bought the home from Audrey Johnson in August 1984. Ms. Johnson had never occupied the new home which was to be constructed by the builder and which was not fully constructed at the time of the purchase by Feroze.

The contract of sale of the home, Exhibit 5, was prepared by the attorneys of Dr. Feroze. The builder of the home was named Mr. Thompson.

Dr. Feroze testified that in August 1984, he was asked to inspect the home with the builder. During the inspection, Dr. Feroze made certain queries but none were written down. One such query dealt with why only three downspouts had been installed on the home rather than four. The response was that a fourth was not needed.

He also asked about a large amount of earth which he noticed under the patio and steps. He was told it was for insulation. The patio deck sat on the earth and its wood support system was hidden completely by the earth.

Dr. Feroze testified that the effective date of possession of the home was August 31, 1984, as per the Certificate of Possession. Possession was taken by Feroze as the first occupant of the home.

Dr. Feroze stated that he found certain problems in the home in the first year of occupancy but admitted that he did not complain within the first year of them, in writing or even orally, to the New Home Warranty Program. In fact the New Home Warranty Program was only informed of these complaints on August 10, 1989, almost five years after Dr. Feroze and his wife had taken possession of the home.

Dr. Feroze also testified that he had received a payment from the builder in the amount of \$160.00 under Item 1 of his claim.

The first three items of Dr. Feroze's claim dealing with the return air, the down pipe, and the sanding and painting of the railing are all claims which are clearly not major structural defects. As a result, the Tribunal rejects these first three claims because they were not made within the first year.

There remains the final items concerning the patio. Dr. Feroze has claimed that these items together constituted a major structural defect under Section 14(1)(c) of the Ontario New Home Warranties Act.

If these items constituted a major structural defect, his claim with respect to the patio was made within the prescribed delay of five years.

Dr. Feroze testified that in May 1989, while walking on the patio, one plank of the deck broke. When he removed the plank, he noticed that the main supporting beam had rotted through. He had an estimate done on the cost to replace the patio as well as to remove all the earth and this amounted to \$6,150.00.

He contacted the builder who refused to intervene stating that he had sub-contracted the work to a builder who had gone out of business. In the meanwhile Dr. Feroze proceeded to have a patch-up job done on the patio at a cost of \$609.00.

After sending his letter of complaint, Mr. Richters, of the New Home Warranty Program, came on October 27, 1989, to inspect the problem. At that inspection Mr. Richters agreed that the patio was poorly built.

In cross-examination, Dr. Feroze stated that the patio gave access to the basement of the home. He also stated that access to the basement existed through the home itself.

Dr. Feroze was the sole witness to appear on behalf of the demand. He presented no expert witnesses to prove the existence of a major structural defect. In effect, he is asking the Tribunal to base its judgement solely upon his opinion. Dr. Feroze is not a builder and has demonstrated no proven expertise in this area. As the claimant, the burden of proof was his to demonstrate the existence and nature of the defect.

Mr. Cliff Thomson, was the first witness to testify on behalf of the New Home Warranty Program. He stated that he was the builder of the home, that the deck was made of cedar, and that the wood needed no special treatment.

He also testified that it would cost no more than \$1,500.00 to replace the whole of the patio including the foundation and steps. When asked to comment on the estimate by Reli-A-Craft, he stated that removal of the earth from under the deck would cost from \$4,000.00 to \$5,000.00 of the \$6,150.00 in that estimate.

In cross-examination, Mr. Thomson was asked why the cedar was not stained. He stated that staining would have been merely cosmetic and would not in any way preserve it.

With respect to leaving the earth under the patio, he stated that it formed part of the grading and should not be removed. He did not believe that the earth caused any rotting but rather that continued wetness caused by improper maintenance was the cause.

The final witness to testify was Mr. Andy Richters, Senior Technical Inspector of the New Home Warranty Program.

He stated that he went to inspect the home on October 27, 1989. He then presented to the Tribunal photographs of the entire patio.

He testified that he saw decaying at the top part of the header over a 2' area. The earth was a few inches below the header and most of the decay was above the earth. He believed that the



decay came from moisture through rain, snow and leaves. The header itself was not broken.

Mr. Richters testified that the problem with the header and patio did not effect the building as a whole and no load-bearing function was at risk. Even with respect to the patio, he found that the load-bearing function was still intact and he observed no area of collapse.

He was of the opinion, as one who has been in the building industry for some thirty years and was trained as a carpenter, that the cedar required no treatment.

He testified that he was able to walk on all areas of the deck.

He said that to repair the header approximately twelve boards would have to be replaced together with one or two joists, the whole at a cost of \$300.00 including labour. To remove the deck and replace it and its steps would cost \$2,500.00.

Mr. Richters saw no rotting in the planks of the deck and saw no signs of collapse.

The Tribunal, after inspecting each of the photographs, could observe no rotting in planks nor any collapse of any part of the patio. The area containing the problems of which Dr. Feroze complained covered perhaps three to four planks or 2' out of 38'.

In cross-examination, Mr. Richters stated that wood foundations to the patio could properly be built surrounded by earth and that the patio could sit on top of the earth. He believed the deck was constructed poorly in terms of the lay out of the joists and planks but he saw no broken planks nor collapse of any of the joists or header. He testified that the poor construction did not in any way effect the integrity of the patio structure which was structurally safe. He did however see leaves gathered where the problem existed.

The Tribunal finds that Dr. Feroze has not established the existence of a defect in the patio structure or the patio itself. The burden of proof was on him to do so and his failure to do so, must result in the rejection of his claim. The problem with the rotting of a small part of the header could have resulted from normal wear and tear, lack of maintenance, and/or the shrinkage of the wood caused by drying. These are all exclusions under Section 13(2) of the Ontario New Home Warranties Plan Act.

It is also in proof that the earth would not cause the problem of which Dr. Feroze complained and there was no reason, therefore, to remove it.

Even if the Tribunal found that Dr. Feroze had proved the existence of a defect, the said defect did not constitute a major structural defect as defined in Section 1(o) of the regulations:

"major structural defect" means, for the purpose of clause 13(1)(b) of the Act, any defect in workmanship of materials;

- (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load bearing function, or
- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

The burden of proof was on Dr. Feroze to demonstrate the existence of a major structural defect.

It was held in the case of Dr. Louis Fields, 1982 CRAT, Vol. 11, p. 88 at p. 92:

The Tribunal accepts that there was a defect in the roof. The Warranty Program admitted this and would have fixed it, they have stated, had it been the subject of a written complaint within the one-year period - which the Tribunal holds it was not. But whether it was a "major" as a well as a "structural" one the Tribunal

knows not. The evidence ought to have been strong, certain, unequivocal, and authoritative. The evidence presented in support of the claim did not discharge that onus."

Based on the photographic evidence and the proof presented, Dr. Feroze failed to prove that any deficient workmanship had produced a failure in any load-bearing portion of the home or any adverse affect or deficiency in the function of the home. The Tribunal was convinced by the photographs and other evidence that the patio was not in imminent danger of collapse and that the building as a whole was certainly not in danger of any collapse.

The cases of Dr. Louis Fields and Kennedy deal extensively with the term "major". In the case of Dr. Louis Fields at pages 92 and 93 the Tribunal held,

The use of the word 'major' in the all-important phrase 'major structural defect', which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. 'structural defect' and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word 'major'. The defect must therefore be 'major' to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

.....

In passing the Tribunal notes that the use of the word 'major' implies the fact that there exists an antonym to that word or complementary opposite which is the word 'minor'. That is to say, the concept of a 'major structural defect' implies the complementary concept of a 'minor structural defect'. The Legislature must have had both such kinds of

deficiencies in contemplation - one warranted and one not warranted."

The Kennedy case (1982) CRAT Volume 11, p. 109 held as follows at p. 110:

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse...

The Kennedy case was followed in the cases on Kenneth Earley (1986) Volume 15 CRAT at p. 136 and Marilyn and Murray Ferguson (1987) CRAT Volume 16 at p. 150.

The Tribunal holds therefore that the defect of which Dr. Feroze complains does not constitute a major structural defect under the Ontario New Home Warranty Plan Act.

Accordingly by virtue of the authority invested in it under 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims.

599210 ONTARIO INC.  
(TEMPO CONSTRUCTION AND DEVELOPMENT)

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
JOHN HURLBURT, Member

APPEARANCES:  
FRANK P. SONDOLA, representing the Applicant  
CAROL A. STREET, representing the Ontario New  
Home Warranty Program

DATE OF  
HEARING: 19 July 1990 Toronto

REASONS FOR DECISION AND ORDER

The facts leading up to the Registrar's decision to refuse to renew the registration of the builder were based upon the fact that the builder failed to correct work on a home constructed by it, that the builder failed to comply with the requirements to effect repairs pursuant to the conciliation order and subsequently after the Program had paid out a settlement to the homeowner, the builder failed to pay the invoice which was assessed against the builder by the Program.

The evidence indicated that the owners Mr. and Mrs. Laurenzano purchased the property at 10 Kordun Street in Hamilton from the builder, the closing of which occurred on November 28, 1986. It appeared that there were a number of problems which were communicated to the builder, but which were not corrected. In November 1987 within the first year, the purchasers gave notice to the Program and following that a conciliation occurred on June 10, 1988 at which the builder was present.

Mrs. Lorenzano gave evidence that on two occasions only subsequent to the conciliation, workmen came to her home without notice and at inconvenient times. She requested them to make an appointment, but they failed to do so. The builder maintains that his repairmen attended at the premises on a number of occasions and were denied access, but the builder had no direct knowledge of this, only the hearsay evidence provided to him by his repairmen.



The builder, in his evidence, contended that he met with the Program in July or August to complain about the lack of access. In fact, there is no record of this meeting in the files of the Program and the Program wrote a letter to the builder under date of August 15, 1988 advising the builder, that the homeowner had complained that the builder had not responded to the conciliation report. The letter indicated that if there had not been a response from the homeowner within seven days of receipt of the letter, the Program would consider the builder to be in breach of his warranty. This letter was delivered by courier, but the builder maintains he did not receive it.

In the letter which accompanied the conciliation report and which, in fact, was signed for by the builder's daughter, the builder was notified that if there was a legitimate reason why work could not be completed, he must notify the Program in writing. No such notification took place and the Tribunal has simply the evidence of the builder unaccompanied by any corroborative evidence. The facts do not support the builder's contention of his having attended a meeting with the Program regional manager in July or August of 1988.

In any event, no further activity occurred on the part of the builder. He made no effort to go to the owner's home and he made no attempt further to contact the Program. The only activity which occurred subsequently was that which followed the forwarding of an invoice by the Program on November 11, 1988, separated into an amount of \$5,000, being the amount which the Program settled with the homeowner and an amount of \$750, being the 15% administrative fee routinely assessed by the Program, for a total invoice of \$5,750. This resulted in a meeting which both the Program and builder agree occurred on January 23, 1989. Apparently the Program offered to settle with the builder on a 50/50 basis at that time, but the builder refused.

The builder contended that there was a problem with his mail. Some apparently got through as evidenced by the registered receipt filed before the Tribunal. Other mail, however, according to the builder did not arrive. Yet all of the mail was addressed to the builder at the builder's premises on file with the Program. It is the view of the Tribunal that the builder has an obligation to establish reasonable business control over his operations so that communication between the builder and the Program can be maintained.

It is also the view of the Tribunal that the builder has an obligation to see that matters referred to in a conciliation

report are followed up and satisfactorily resolved with both the Program and the homeowner. Neither of these obligations have been satisfied and the builder cannot now, therefore, complain of the process which is followed by the Program. For that reason, the Tribunal is of the view that the Proposal of the Program in the circumstances of this builder and the events which have been referred to in evidence before the Tribunal would have been reasonable and if there had not been other considerations, the Tribunal would have fully upheld the Proposal of the Program.

There are, however, some concerns of the Tribunal in respect to the procedures followed by the Program in regard to this matter. In the first instance, the Program's own estimator considered the cost to rectify the work of the builder at approximately \$2,500. When the estimate came in to the Program at an amount of \$5,650, even though it may have been justified and in fact appeared to be so in the evidence of the contractor engaged by the Program which he gave to this Tribunal, nevertheless, it is the view of this Tribunal that the Program's estimator should have questioned the estimate in view of the fact that only one estimate was obtained when three had been requested. In the view of this Tribunal, this placed upon the Program some obligation to be fully satisfied that the estimate received was appropriate.

The second matter of concern to the Tribunal is that on August 15, 1988, the Program wrote to the builder indicating that the builder was in breach of its warranty and that the Program would proceed to have the work done by its contractors at an estimated cost of \$525. Although the builder claims never to have received this letter, if he had so received it the Tribunal would have found that the \$525 is a far cry from the \$5,000 claimed by the Program in its invoice of November 1988. When the error was noticed, no effort apparently was made to give the builder notice of this discrepancy.

In the view of this Tribunal, had the builder received this letter of August 15, 1988, he might very readily have believed that this was a reasonable cost and if he had been having difficulty with the owner, he might well have preferred to have the Program handle it for \$525 plus a 15% administrative charge. This would have been a logical alternative when having difficulty with the particular owners. If in fact, the builder had offered to pay this amount, the Program might have been hard put not to accept it in view of its letter of August 15, 1988 and the builder might then have been in a position of not having to post the security which the Program is now requiring to be done.

But the builder has not done so and it, therefore, must face the consequences of its failure to deal responsibly with the Program and in accordance with its obligations under the Ontario New Home Warranties Plan Act. Because of these administrative errors on the part of the Program, the Tribunal is of the view that the full amount of the settlement paid to the homeowner should not be charged to the builder. In view of the fact that the builder could have resolved this matter by paying 50% of this amount, but did not do so, it is the view of this Tribunal that the amount which he should be charged is 75% of the amount settled in the amount of \$3,750, plus an administration fee of 15% being a further \$562.50, for a total of \$4,312.50. The Tribunal is also of the view that the Program's Proposal to require security for each home under construction or warranty should also be upheld.

By virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to vary and carry out his Proposal as set out in the Reasons for Decision and Order herein. The Applicant shall pay to the Program the sum of \$4,312.50 and file security for each home under construction and/or warranty in the amount of \$2,000 for each such home within 15 days of this Order failing which its registration shall be revoked. At such time as the warranty period has expired for each such home, the security relating to such home shall be released by the Program provided that no claims are then being asserted against the Applicant or the Program. The Tribunal further directs that the Program review on an annual basis the necessity for continuing such security based upon the Applicant's then current performance.

523205 ONTARIO LTD.  
(GLOBAL CONSTRUCTION)

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
MICHAEL E. LERANBAUM, Member  
JOHN HURLBURT, Member

APPEARANCES:  
ANNA CHUNG, representing the Applicant  
  
STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 18, 26 October 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Notice of Proposal of the Registrar of the Ontario New Home Warranty Program to refuse to renew the registration of Global Construction (legal corporate name of Global Construction is 523205 Ontario Ltd.) The Notice of Proposal is dated April 2, 1990.

The grounds for refusal to renew the registration arise from the construction of two homes by Global Construction - one home for Mr. and Mrs. Fisher located at 118 Eastville and the other for Mr. and Mrs. Hamilton located at 118A Eastville Avenue, Scarborough. These were the sole homes this builder built in this area.

The grounds for refusal of registration are that the builder has a record of breaches of warranties within the meaning of Section 8(2) of the Ontario New Home Warranties Plan Act because the builder failed to comply with Conciliation Reports rendered by the New Home Warranty Program with respect to the Fisher home and the Hamilton home. The failure to do so necessitated the New Home Warranty Program proceeding to have the repairs carried out at a gross cost of \$60,672.56 for the Fisher home and \$17,278.75 with respect to the Hamilton home as at the date of the judgement, April 2, 1990.

The second ground for refusal of registration is that the builder failed to indemnify the New Home Warranty Program for the gross amounts paid to repair both homes, the whole in breach of subsection (4) of Regulation 728 of the Act.

The third ground is that the builder failed to provide the security required with respect to the construction and sale of houses requested in a letter dated February 28, 1990. By virtue of the said letter, the Ontario New Home Warranty Program called upon the builder to provide security in the form of an irrevocable letter of credit or certified cheque in the amount of \$20,000 per unit prior to the construction of any units.

The demand for such security was based on the history of construction performance of the builder which was found to be unsatisfactory.

The builder has asked that the Tribunal direct the Registrar to refrain from carrying out his Proposal and order that the Registrar renew the registration of the builder. The builder claims that it was cooperative with the New Home Warranty Program and that in the case of the Fishers, an agreement had been reached by which no further claims existed against the builder; as a result, the builder had committed no breaches which would entitle the New Home Warranty Program to refuse the renewal of registration.

The lawyers for the builder also allege that the New Home Warranty Program did not respond to certain letters sent by the solicitor and, therefore, paid for the repairs before the builder had a chance to properly question them. The failure to respond to the letters constituted a breach, the builder argues, which somehow releases the builder from paying the amounts expended by the New Home Warranty Program. In any case, the builder argues, because of a Release signed by the Fishers, the claim by the New Home Warranty Program with respect to those repairs is unfounded.

Given the claim by the solicitors for the builder that proper notice was not received with respect to the work carried out on the Fisher home, the Tribunal shall briefly review the documentation exchanged by the New Home Warranty Program and the builder in connection with the Fisher claim. This documentation is in great part contained in Exhibit 3 deposited by the solicitor for the builder.

Tab one of Exhibit 3 contains an Agreement dated May 9, 1988 which is entitled:



This is an agreement between Bill Shu representing Global Construction and Paul and Terry Fisher in regards to outstanding work and money owing at 118 Eastville Avenue, Scarborough Ontario.

This document was prepared by the purchasers, Paul and Terry Fisher and contained hand written notes by Mr. and Mrs. Fisher. By the terms of this Agreement signed by the builder and Mr. and Mrs. Fisher - but not by the New Home Warranty Program - the builder undertook to complete certain landscaping, as well as to pay the Fishers the sum of \$2,500 as compensation for outstanding trim and cosmetic items at 118 Eastville Avenue.

At the bottom of the page, Mrs. Fisher wrote the following:

We will notify HUDAC that we have reached a settlement with Global Construction in regards to unfinished items on 118 Eastville Ave.

While the notation of Mrs. Fisher was that the settlement was for unfinished items, the Tribunal must interpret this statement in a manner which is consistent with the intent of the document. In this connection, the Tribunal notes that the sum of \$2,500 was compensation for outstanding trim and cosmetic items.

The builder has attempted to interpret the Release to be for any and all items of warranty which the buyer had or would have against the builder at the time the settlement document was signed on May 9, 1988; the Tribunal finds, however, that this interpretation is far too broad given the language of the Agreement which is clear. That is, the Agreement to settle was with respect to all outstanding work owing by the builder, such work being for outstanding trim and cosmetic items and in lieu of the installation of a high efficiency furnace.

This is borne out by the fact that the Fishers made a claim to the New Home Warranty Program based on breaches of warranty by the builder in the construction of the home. As a result, an inspection was held by the New Home Warranty Program on August 19, 1988 at which not only Mr. and Mrs. Fisher were present, but also Mr. Bill Shu of the builder. A copy of the report can be found in Exhibit 3, tab 2.

The complaint of the Fishers was with respect to exterior brick work which showed serious deficiencies, as well as with water leakage in the cold room, large bumps on the floor, and poorly

installed tile work in the ensuite. There were additional complaints which were not treated as being recoverable under the New Home Warranty Plan Act. A copy of this report was sent to the builder by the New Home Warranty Program on September 15, 1988 and called upon the builder to complete the work listed in the report within 45 days of receipt of the letter.

At this time, therefore, the builder was well aware that the Fishers did not consider the settlement document as being for all outstanding problems with the home. In any case, it is clear that the New Home Warranty Program did not consider the settlement as being a bar to claiming repairs by the builder of items subject to warranty under the New Home Warranties Plan Act.

It is to be noted furthermore, that at this stage the builder did not claim that the settlement Agreement of May 9, 1988 excluded any such claims since by a letter dated October 11, 1988, the solicitor for the builder notified the New Home Warranty Program that the builder had carried out certain repairs which were not previously completed or compensated or by way of cash settlement under the May 9 Agreement. (Exhibit 3, tab 3)

Despite the claims by the solicitors of the builder that the warranty work had been carried out, the Ontario New Home Warranty Program notified the builder that the deficiencies had not been satisfactorily repaired. By notice letter dated October 26, 1988 (Exhibit 3, tab 4), the Program called upon the builder to complete the repairs of warranted deficiencies listed in the inspection report.

Neither the builder nor the solicitors for the builder responded to this letter; nor did the builder carry out any further work. As a result, on December 8, 1988, the Program sent a further notice to the builder (Exhibit 3, tab 5) calling upon the builder to carry out the conciliation report by December 22, 1988 in default of which the New Home Warranty Program would either cash settle the Fishers' claims or have its own contractors make repairs on behalf of the builder. The Program also informed the builder that it would be invoiced all costs and administration fees for carrying out such repairs.

On January 25, 1989, the solicitors for the builder wrote the New Home Warranty Program with respect to the cash settlement Agreement of May 9, 1988 and stated that the file had been sent to a department of the Program for an opinion as to whether it covered all other matters subsequently dealt with in the conciliation report.

The last paragraph of the letter reads as follows: "Would you please advise us of your decision in this regard as soon as possible so that we may advise our client of the same." This letter was produced in Tab 6.

No response was sent by the Program directly to the solicitors. However, on May 19, 1989, the Program sent the builder and its two principals, William Shu and Sing Chen, a registered letter claiming the sum of \$7,555.50 to cover a part of the repair work carried out on the Fisher home. The work was with respect to the basement, the kitchen flooring and removing tiles for which the contractor billed the Program the sum of \$6,570. The Program added a 15% administration charge of \$985.50 when invoicing the builder.

Thus, while the New Home Warranty Program did not give a direct answer to the solicitors in response to their letter of January 25, 1989, the builder must have known by May 19, 1989 that the New Home Warranty Program did not consider the settlement document as covering all items in the report since that was the date on which the first invoice was sent to the builder.

As appears from the record, no written response was made either by the builder or the solicitors for the builder contesting the invoice or the right of the New Home Warranty Program to have sent it. Given the knowledge the builder and its solicitors now had, it was incumbent upon them to take the necessary procedures at that time. Instead the notice of invoice was followed by complete silence and inaction.

The New Home Warranty Program, therefore, continued with the repairs of the warrantable items. Thus, as appears in tab 7, on August 15, 1989, the Program sent the builder and its principals a second invoice with respect to the Fisher home; this one for \$11,872.31 to complete the items of work listed in the first invoice. This invoice was sent some three months after the first invoice and was made up of a direct payment to the contractor by the Program of \$10,323.75, to which was added a 15% administration charge of \$1,548.56.

Again, no response in writing was made by either the builder or its solicitors. At this stage, the brick work still remained to be corrected. It had already been found in a subsequent meeting that the repairs called for was for the complete replacement of the brick. Given the failure of the builder to respond or to proceed with the repair work, the Program had the work carried out during November, 1989, almost three months after the second invoice for repairs had been sent to the builder.

On December 4, 1989 (tab 8), the Program billed the builder and its principals the sum of \$41,244.75 for the replacement of the brick. This was made up of a sum of \$35,865.00 which the New Home Warranty Program paid to its contractor, to which was added a 15% administration charge of \$5,379.75 which the Program billed to the builder.

Again, no response was sent to the New Home Warranty Program until March 22, 1990, more than three months later, in which the solicitors for the builder argued that the repairs should not have been carried out given that they had not received a response to their letter of January 25, 1989 sent more than 14 months earlier.

The Tribunal finds that the claim by the solicitors of the builder, that proper notice was not received, is unfounded. If all the work had been carried out at the same time and a global bill for \$60,672.56 had been sent by the Program to the builder, there might have been some justice to the builder's argument. This was not the case, however; the work was carried out in stages with the least expensive invoice sent first.

Some six months elapsed between the first invoice of May 19, 1989 and the final work for the most expensive part in mid November 1989. Both the builder and its solicitors knew at a very early stage, the exact intentions of the New Home Warranty Program. It was at that first stage, therefore, that they should have taken any of their proceedings, rather than waiting until all the work was carried out before trying to raise as a bar to the action failure to receive notice.

It would have been preferable for the New Home Warranty Program to send a letter to the solicitors responding directly to their initial request. Given the fact that the builder had effective notice of the position by the New Home Warranty Program, the sole question to be decided with respect to the claim for compensation by the Program is whether the release document had the legal effect of releasing the builder from any further claims by the New Home Warranty Program for repairs carried out by virtue of the New Home Warranties Plan Act.

In the case of the Hamilton residence, there was no settlement document drafted in broad terms. In this case, the builder was informed by the Program on June 24, 1988 of certain claims for repair of deficiencies made by the Hamiltons. The builder was given two weeks to correct them.

When the builder failed to contact the Hamiltons, the Program arranged for an inspection of the home on September 14,



1988 to which the builder was invited to attend but failed to do so.

On September 28, 1988, the New Home Warranty Program sent a copy of the report to the builder (tab 14) and called upon the builder to complete the work required within 45 days of receipt of the letter.

On October 24, 1988 the solicitors for the builder advised the Program that all the work had been carried out. This, however, was not the case since on February 6, 1989 (tab 16), the Program again called upon the builder to carry out the repair work. It warned that its failure to do so would lead to the Program making a cash settlement with the purchaser or having the work carried out.

On February 24, 1989, the Program called upon the builder a further time to carry out the repair work by March 10, 1989. This was followed by a further letter dated April 21, 1989 (tab 18), again giving the builder 45 days to carry out the repair work listed.

Despite all these notices, the builder failed to carry out the deficient work and, therefore, the New Home Warranty Program had a contractor carry out the repair work in October 1989.

On November 13, 1989 (tab 20) it sent a letter to the builder and its principals calling upon them to pay the sum of \$17,278.75 for payment of part of the repairs carried out on the home. This amount included the sum paid to the contract of in the sum of \$15,025.00 to which was added a 15% administration charge of \$2253.75 payable by the builder to the Program.

The Tribunal must decide whether the builder is entitled to have its registration renewed and if so, whether it should be renewed under certain terms and conditions as proposed by the New Home Warranty Program.

Mr. Ed Perryman testified on behalf of the New Home Warranty Program. He is Manager of the New Home Warranty Program's Toronto office and has been involved in the domain of residential construction since 1958.

After producing as exhibits the New Home Warranty Program's document book of the Fisher and Hamilton residences, he testified that his office had asked for security from the builder, Global Construction, before renewing its application because the builder had had serious problems with respect to warranties on new homes which it had constructed. The office found that the builder



was not cooperative in handling claims and did not honour its obligations under the New Home Warranty Program.

As he put it, the company had only built two homes and both had had serious problems because of defective work. In the case of the Hamilton home, for which the Hamiltons had paid \$218,000, many complaints with respect to the construction were listed on the Certificate of Possession. The buyers then had their solicitors send a letter which detailed the complaints - complaints which were with respect to all areas of the home.

The New Home Warranty Program notified the builder and told them to do the required work. When the builder did not respond to their letter of June 24, 1988, the New Home Warranty Program called for conciliation. A further notice dated September 28, 1988 was sent asking the builder to complete the work within 45 days, in default of which the New Home Warranty Program would have it done. He noted that the builder failed to attend certain of the inspections of the home although invited to do so.

Mr. Perryman then reviewed the inspection report, item by item, showing photographs with respect to the deficient work. The Tribunal could observe from the photographs that the brick work of the home was of very poor quality. It contained cracked bricks, poor mortar matching with respect to the pointing. Certain repair work carried out was done poorly. Mr. Perryman stated that the builders really did not co-operate in trying to resolve the problems. Their lawyers had sent a letter indicating that the repairs had been carried out on October 24, 1988, but the Hamiltons denied this saying that almost nothing had been done.

Despite repeated further notices for the builder to perform its obligations, it failed to do so. Even though the New Home Warranty Program could have proceeded with having the repairs done at that point, it decided to hold a reinspection of the Hamilton home on February 21, 1989 to which the builder was invited to attend. The builder failed to do so.

The builder was informed of the findings and given another delay to repair the work. When it failed to do so, the New Home Warranty Program had the first part done at a cost of \$17,278.75. It then sent an invoice to Global for the amount it had paid, adding to it its 15% administration fee.

Mr. Perryman then reviewed the case of the Fisher home. The inspector found that the brick work was so badly done that it was beyond repair. This was borne out by certain photographs which Mr. Perryman deposited into the court record as Exhibit 12. Again, despite repeated notices to carry out the work, the builder failed

to do so and so the New Home Warranty Program proceeded to have the work done at a gross cost of \$60,672.06.

Mr. Perryman was of the opinion that the builder, Global Construction, did not have the expertise required to properly construct and service a home.

In cross-examination, Mr. Perryman stated that the New Home Warranty Program awarded the contracts to the lowest bidders.

Mr. Perryman concluded by stating that the New Home Warranty Program would be prepared to renew the permit of the builder if the builder repaid the Program all monies presently owing and agreed to put up security of \$20,000 for each unit which it intended to build.

Bill Shu was the sole witness on behalf of the defence. He declared that he was Vice-President of Global Construction and was in charge of its operations. He oversaw construction of the homes in question.

He testified that his company had reached an agreement with the Fishers which in his mind freed the construction company of any further obligations with respect to their home.

Despite this, he admitted going to the inspection meeting August 19, 1988, some three and a half months after the conclusion of the settlement agreement. He even attempted to carry out certain repairs after that date.

In the case of the Hamilton home, he claimed to have tried to have the repairs carried out, but that the Hamiltons had refused to give access to his workers. In this connection, although Mr. Shu attempts to create the impression of the Hamiltons not co-operating, the Tribunal takes note of tab 16 which contains a written note by Hamilton stating that he phoned Global Construction on certain occasions and got no answers and when he went to the office, he still was unable to see any of the principals. This contradicts the testimony of Mr. Shu with respect to this matter.

In cross-examination, Mr. Shu admitted that he had received all correspondence and Conciliation Reports. He only went to one of the meetings called by the New Home Warranty Program; he chose not to go to the others.

On the basis of the documentation and testimony, the Tribunal concludes the following:

1) The construction work of the builder with respect to the Fisher and Hamilton homes was of very poor quality that did not meet the standards to which consumers were entitled.

2) The builder showed a flagrant disregard of its obligations to properly warrant the construction of the homes. It failed to co-operate with the New Home Warranty Program in determining the repair work which had to be done to correct the deficient construction. Then, despite being called upon to carry out the necessary repair work which was warranted under the Act, the builder failed to do so although given extensive delays. Every builder in the Province of Ontario has as a primary responsibility, the obligation to properly warrant a home. The failure to do so constitutes grounds for refusing the renewal of registration of any such builder.

3) The builder was given more than sufficient notice of the position of the New Home Warranty Program with respect to its allegation that there had been a total settlement which freed it of any responsibilities with respect to the Fisher home. The builder did not have the right to simply sit back and do nothing, letting the New Home Warranty Program carry out the repairs. From the time the New Home Warranty Program had made its position clear, the builder was under the obligation of taking some legal proceeding rather than doing nothing.

In the case of the Hamilton home, no settlement of any sort had been made. The failure, therefore, of the builder to proceed with the repair work is all the more serious.

4) With respect to the Agreement of settlement made by the Fishers and Global Construction, the builder was not entitled to use the settlement as a bar to fulfilling its responsibilities under the New Home Warranties Plan Act. Section 13(6) of the Act states:

The warranties set out in subsection (1) apply notwithstanding any agreement or waiver to the contrary...

It is clear from the evidence that at the time the settlement document was drafted, the Fishers did not realize the full extent of the deficiencies which existed in their home. As a result, they were not entitled to waive the warranties which they were entitled with respect to those deficiencies. Those deficiencies were far more than the cosmetic deficiencies cited in the settlement Agreement. Since they could not be waived, the builder remained responsible to carry them out.

Even if one could argue that the Fishers could waive their warranties with respect to items whose full scope they were not aware of, Section 17(4) of Regulation 726 states:

Any settlement or release does not bar the rights of the corporation unless a corporation has concurred therewith in writing.

Since the corporation did not concur in writing with the settlement allegedly reached by the parties, Global Construction was not released from its obligation to carry out the repair work required because of the deficiencies. The New Home Warranty Program, therefore, was well within its rights to have the repairs carried out and to invoice the builder and its principals for the cost of these repairs.

The builder is presumed to know the law and, therefore, of Section 17(4) of the Regulation. It was his responsibility, therefore, to ascertain that the New Home Warranty Program concurred with any settlement he intended to reach with the Fishers and to have the corporation indicate its concurrence in writing. Its failure to do so meant that the builder remained liable for any repairs required under the Act.

By virtue of Section 1, subsection 4 of Regulation 728, the New Home Warranty Program is entitled to seek indemnification from Global Construction from any loss which it suffered by reason of the builder's failure to diligently perform its obligations under the Act.

The New Home Warranty Program has claimed in the case of Fisher that it is entitled to receive \$60,672.06, an amount which includes an administration fee of 15% charged by the New Home Warranty Program to the builder. The Tribunal has found nothing in the Act or regulations which gives the New Home Warranty Program the right to add a 15% administration fee to any sums claimed from a builder.

To the Tribunal, the loss for which the New Home Warranty Plan is entitled to claim indemnification can be only the amounts which the New Home Warranty Program has actually paid out to a contractor or a new home buyer to execute the repairs. In this regard, Section 17(2) of Regulation 726 lends support to this interpretation. It states that the corporation is entitled under its rights of recovery to seek as damages "the quantum of which shall be limited to the amount paid out of the guarantee fund by the Corporation."



As a result, in the case of the Fisher home, the New Home Warranty Program is not entitled to claim the sum of \$60,672.56. The amount the New Home Warranty Program actually paid to contractors to repair the work in the Fisher home was \$53,758.75.

Section 6(3) of the Regulation, however, states that the maximum amount payable to an owner in respect of warranty coverage of the Act or regulations shall not exceed \$50,000.00. This being the case, the New Home Warranty Program is not entitled to claim \$53,758.75 from Global Construction, but rather the sum of \$50,000.00 less the sum of \$2,500 which the Fishers received from the builder by virtue of the settlement Agreement. The New Home Warranty Program is, therefore, only entitled to the sum of \$47,500 from Global Construction with respect to the Fisher home.

In addition, as at the date of the Proposal of the New Home Warranty Program, the Program is entitled to the sum of \$15,025 with respect to the Hamilton home. This is the net amount which it paid to have certain repairs done on the Hamilton home.

In addition, the Tribunal finds that the principals of the builder should be required to take certain courses to improve their skills as builders under the Program.

The Tribunal, therefore, orders the New Home Warranty Program not to carry out its Proposal to refuse renewal of the registration of the builder, but rather to renew the registration of the builder subject to the following terms and conditions:

1) Global Construction (523205 Ontario Ltd.) shall first pay to the New Home Warranty Program the sum of \$47,500.00 with respect to the Fisher home and the sum of \$15,025.00 with respect to the Hamilton home, forming a total of \$62,025.00;

2) The principals of Global Construction shall first attend a Building Trust Partnership seminar, a workshop aimed at improving after sales service; and

3) Global Construction must undertake to submit security in the form of an irrevocable letter of credit or a certified cheque in the amount of \$20,000.00 per unit as each enrolment is submitted to the Program. The security will be held by the Program for one year starting from the date of occupancy of each unit. At the end of the year, the conciliation and construction performance of the builder will be assessed by the Program and if it is satisfactory the security will be released or reduced.



VARGHESE GEORGE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES G. LESLIE, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
LOUIS A. RICE, Member

APPEARANCES:

VARGHESE GEORGE, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 15 May 1990

Toronto

REASONS FOR DECISION AND ORDER

The appellant brings this appeal to the Tribunal from the decision of the Ontario New Home Warranty Program disallowing his claim for the repair of two items, Nos. 1 and 14 on his list of particulars in dispute, attached to his request for conciliation. They are as follows:

1. Not enough space provided for washer and dryer.
2. No wood put on floor for railing between kitchen and family room.

Mr. George took possession of his new home at 394 Ceremonial Drive, Mississauga on October 22, 1987 and brought his complaints to the attention of the Program on April 15, 1988. All matters have now been addressed by the builder, except the above two which remain in dispute.

In his evidence, Mr. George points out that there is insufficient space in the laundry room to accommodate his electric washer and gas dryer; each of which, he says, is 29 inches wide. The builder, in an attempt to remedy the situation, cut away the quarter round and baseboard, and although the appliances fit in the space, there is no room to remove them for cleaning purposes. Mr. George suggests that a different cabinet and tub would be the proper remedy, thereby allowing more space for the appliances.

The matter being the subject of conciliation was addressed by Richard Johnson, conciliation officer from Brampton, when he attended at the premises on two occasions, October 30, 1989 and January 2, 1990. Johnson observes that the average width of a room intended for this purpose is 60 inches and the subject room is 58 3/8 inches, but complies with the standard opening required. He observes there is no breach of the Building Code, nor is there any defect in workmanship or materials.

He testified that the problem could be resolved by the installation of a new tub and cabinet at a cost of approximately \$300.00. Mr. Johnson had measured the washer and dryer which were 29 1/4 inches and 29 inches respectively. The appliances obviously fit in the space provided, but removing them would understandably be difficult.

As far as the lack of moulding is concerned, there is, in Johnson's view, nothing wrong with the present installation. He does point out that in replacing the tiles at some future time, they must be cut specifically to fit around the spindles. Again, he finds no breach of the Building Code or any defect in workmanship or materials.

William Lyth, employed by the builder Lakewood Estates as a service representative, testified that the issue of the moulding was a contractual matter and could have been purchased by the Applicant as an extra. He said moulding was used on the floor only when ceramic tile was installed and this was not ordered as an extra by Mr. George. The Offer to Purchase did not include this as an extra or as part of the builder's commitment under the contract. This evidence has not been refuted and we, therefore, accept it as a fact.

The Ontario New Home Warranty Program is governed, inter alia, by Section 13(1)(a) of the Ontario New Home Warranties Plan Act which provides for a warranty:

- (a) that the home
  - (i) is constructed in a workmanlike manner and is free from defects in material,
  - (ii) is fit for habitation, and
  - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free of major structural defects as defined by the regulations;

.....

Mr. George must, therefore, bring his complaints within the confines of this section. Clearly, the home is fit for habitation and there is no evidence of structural defect, neither is there evidence of any infraction of the Ontario Building Code. This leaves us to consider only whether the home is constructed in a workmanlike manner and free from defects in materials.

Dealing first with the laundry room, we can understand the difficulty encountered by the Applicant in having the two appliances almost squeezed into an area which just barely accommodates them, and his frustration in attempting to remove them. But this does not constitute a breach of the Building Code and there is no evidence of defective workmanship or materials. We are unable, therefore, to find against the decision of the Program and the claim must consequently be disallowed.

The failure to install the moulding is not a matter for consideration by the Program. Clearly, on the evidence, the moulding could have been purchased as an extra, but was not and if it is an issue between the builder and the owner concerning the interpretation of the contract, then the Program is not involved and no claim may lie against it. The claim is, therefore, disallowed.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claims.

MR. AND MRS. J. GIANCOULAS

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
JOHN HURLBURT, Member

APPEARANCES:

MR. AND MRS. J. GIANCOULAS, appearing on their behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 22 October 1990

Toronto

REASONS FOR DECISION AND ORDER

The Applicants purchased their new home at 803 Savoy Crescent in Mississauga from Mazzocca and Sons Construction Company by an Offer to Purchase dated December 31, 1987. It was one of 123 houses in a subdivision built and sold by this builder.

Mr. Paolo, one of the principals in this Company, who gave evidence at the hearing on behalf of the New Home Warranty Program said that all of these houses were completed in approximately nine months and that the one with which we were concerned here was one of the early ones finished.

The transaction was closed on August 19, 1988 and the Applicants took possession at that time, although the inspection for defects and the completion of the Certificate of Possession did not take place until August 31, 1988. One of the reasons for this was that the builder had not cleaned up the house for the closing, and Mrs. Giancoulas testified that it took her and her husband four days to do this because of a great quantity of debris left about.

The Certificate of Completion and Possession, Exhibit 3, listed five items to be completed, not including the only item with which we were concerned at this hearing - damage to ceramic tiles on various floors in the house. It was the evidence of Mrs. Giancoulas that these damaged tiles were seen at the time of the inspection, but were not included in the Certificate because the builder told them that this was an item that should not be put on

the Certificate and that he would immediately proceed to fix all of these tiles so that the Applicants need not be concerned.

Mr. Paolo, who was not the representative of the Company who was said to have made this representation or who signed the Certificate, but who was there at the time and who dealt subsequently with the Applicants, denied that any such statement was made. He did, however, corroborate Mrs. Giancoulas' evidence that there were damaged tiles to be seen at the time of the inspection on August 31.

This conflict in the evidence is not of great consequence however, because, in any event, the Applicant sent a written complaint to the program well within the year of the date of the Certificate by means of a letter dated July 4, and received on July 13, 1989 covering 12 complaints of which this was the first one listed.

It is agreed that all of the other complaints have now been remedied and at this hearing, we were concerned only with the complaint concerning these tiles. The floors in the basement and on the main floor, including the kitchen and also in two bathrooms on the second floor are covered with 8 in.x 8 in. white high gloss ceramic tiles.

The evidence of Mrs. Giancoulas, verbally and through certain pictures which she took and filed as Exhibit 4; the evidence of both witnesses called for the Program, Mr. Paolo and Mr. Johnston, a Conciliator working out of the Program's Brampton office, established that somewhere between 30 to 50 different tiles altogether, at different locations throughout the house, are damaged.

Schedule "A(2)" of Mr. Johnston's Conciliation Report, Exhibit 6 herein, lists one cracked tile in the kitchen/archway threshold, one in front of the sink with a chip in the centre and several tiles with scratched and several with chips.

The first issue which the Tribunal must determine is a question of fact - were these damages to tiles caused before or after the Applicants took possession of the house on August 19, 1988? In the last paragraph of Schedule "A(2)" aforementioned, Mr. Johnston said that he was not able to assess responsibility for the damaged tiles and, therefore, the item was not warranted. He says it was explained to the Applicants that if they could provide proof that the tile was damaged as they alleged, the Program would reverse this decision. And he stated in his evidence to the Tribunal, that if he could have found that the damage was caused prior to August 19, he would have put the item in Schedule "A(1)".



It is the conclusion of the Tribunal on this issue that the probability is that this damage was caused prior to the Applicants taking possession and, therefore, by the builder or some person or persons for which it is responsible and that this is the inference which should be drawn by the evidence. This was the clear and unequivocal evidence of Mrs. Giancoulas, who appeared to the Tribunal to be an honest and forthright witness whose evidence we accept on this point. She stated emphatically that the family has been very careful since moving in, not to damage any more of these ceramic tile floors and, in fact, no such damage has occurred since that time.

As aforementioned, Mr. Paola confirmed that he saw some of the damage at the time of the inspection. It must be noted that this was on August 31, twelve days after the closing on August 19, but the probability is that the defects seen on August 30 were there on August 19 and not caused in the interval. The nature of the defects, marks which appear to have resulted from nails being on the floor and pressed into the tiles by heavy boots or some other articles on top of them and cracks, chips and scratches which are more consistent with damage done during construction than during a clean-up, corroborates rather than questions Mrs. Giancoulas' evidence on this issue.

It should be noted that the builder has already gone to considerable trouble to remedy defects in these tile floors. Prior to closing, he placed a whole new white floor on top of a coloured one installed by mistake in one of the bathrooms, he replaced a number of chipped or otherwise damaged tiles at other locations and subsequently tried to remedy chips and scratches by covering them with a type of paint which was not successful.

The only case to which we were referred herein was that of Axiak vs. Ontario New Home Warranty Program (1989) 18 CRAT 170. In that case, the failure to include certain scratches in arborite counter tops in an inspection report was found to be fatal to the Applicants because, on the evidence presented, the Tribunal was unable to prove on a balance of probabilities that the scratches were present when the Applicants took possession. For the reasons given above, we have reached the opposite conclusion in this case.

Having found that these some 30 - 50 tiles in various locations about the house are defective, and that these defects are the responsibility of the builder, the second issue arises as to what order this Tribunal should make to remedy the situation. We had no proper estimates before us, either as to what work should be done or what the cost will be for doing so. There was some discussion as to the problem of matching replacement tiles at such

a long time after these floors were laid, but no effort has been made to date to do this and we can, therefore, only speculate as to the probable success of doing so.

On the other hand, we had a very rough estimate from Mrs. Giancoulas based upon discussions she had with third parties, that the cost of replacing all of these tiles on all of the floors with new ones, would be between \$6,000 and \$7,000 and we had a comment from counsel for the Program that this cost would probably be even more than that.

Upon this last mentioned issue, the Tribunal finds that the failure of the Applicants to bring this complaint to the attention of the Program earlier than they did, to which the failure to include it in the Certificate of Completion and Possession appears to have contributed, is a factor of some importance to be taken into account. If the Program had been aware much earlier of this complaint, it might well have been easier to get a better match of replacement tile. The failure of the Applicants in this regard should not assist them in forcing the Program to the expense of replacing all of the floors.

In the result, pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to replace the 30 - 50 damaged tiles in the home, plus any others which may be damaged in the course of doing this work. The replacement tiles used should be sought and chosen by the exercise of a reasonable amount of time and effort to get the best possible match and to bring the finished floors within the provision of Section 13(1) of the Act, to the effect that they are completed in a workmanlike manner and free from defects in materials.

JOHN D. GRAD

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
JOHN HURLBURT, Member

APPEARANCES:

JOHN D. GRAD, appearing on his own behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 10 April 1990

Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Grad took possession of the subject home in February of 1987. The construction of the home had occurred over a protracted period of time. Mr. Grad testified that he attended at the site on each and every day throughout the construction period.

The initial deficiency list filed by the Grads with the Ontario New Home Warranty Program included some 80 items. Three conciliation inspections took place, on October 13, 1987, December 15, 1987 and March 4, 1988 respectively.

Following the third inspection, Mr. Price the Program inspector who had carriage of the file, was transferred to another regional office. The file seems to have next received the attention of Mr. Perryman, Manager, Toronto Regional Office, in December, 1988 when he discussed the outstanding items with Mrs. Grad and made an omnibus offer of settlement to her.

The Grads did not respond to the offer and more than a year passed before they again contacted the Program apparently through their solicitor. This contact generated Mr. Perryman's January 12, 1990 letter which essentially put the previous offer of settlement into writing. The parties have agreed to treat that letter as the Program decision, and the Grads appeal from that decision to this Tribunal.

It became apparent by the end of this hearing that communication between the Grads and the Program has been less than satisfactory over the period preceding this hearing. Had the Program carried out a reinspection, had the Grads better communicated to the Program the details of their unresolved complaints, the hearing would certainly have been abbreviated, if not altogether unnecessary.

Turning to the twelve items that the Tribunal heard evidence on:

- (1) The Tribunal accepts the evidence of Mr. Grad that the builder's painter was responsible for the paint splatters on the door hinges. The Tribunal further accepts Mr. Grad's evidence that the paint cannot be removed from these hinges without also removing the bronze finish. The Tribunal, therefore, allows the Applicant, the sum of \$64.41 being the replacement cost of the hinges.
- (2) With respect to the uneven wall in the lower hall in the area adjacent to the french doors, the Tribunal finds that the protusion, which is clearly evident in the photographs filed by Mr. Grad, is the result of poor workmanship. The Tribunal directs the Program to re-inspect this wall and to repair it in a workmanlike manner.
- (3) The cement splashes on the sliding glass kitchen door are, in the Tribunal's view, the result of sloppy workmanship by the builder's forces. The Tribunal notes that the Program had no suggestions to offer as to how these cement splashes could be satisfactorily removed.

The Tribunal accepts Mr. Grad's evidence that removal is not possible without leaving unsightly marks and scratches on the door. The Tribunal, therefore, directs the Program to pay the Grads the sum of \$150.00 in respect of this item.

- (4) The next complaint is that the front steel double doors have not been properly hung. One door appears to be hung slightly higher than the other and, according to Mr. Grad, this

causes one door to "bind" on occasion. The Tribunal allows Mr. Grad the sum of \$50.00 as compensation for this item.

- (5) With respect to the complaint that the baseboard are unevenly installed, the Tribunal accepts the evidence of Mr. Price that the maximum variance is  $3/8$ " within any one room. The Tribunal considers this to be an acceptable standard of workmanship in this case.
- (6) With respect to the complaint as to additional basement leaks emanating from tie rod holes, the Program did repair one that was found to be leaking on the October 13, 1987 conciliation inspection, and was apparently not aware until this hearing of any other leaks. The Program has volunteered to re-attend and repair any further leaks and the Tribunal directs the Program to do so.
- (7) The next complaint relates to the mouldings installed around the kitchen ceiling. These appear, from the photographs that were filed, to be poorly installed and bent in some locations. The ceiling lighting and moulding had been originally installed by Mr. Grad's installer, but had to be reinstalled after the kitchen ceiling gave way as the result of water leakage in the second floor master bath resulting from a defective drain connection. The Program has not inspected since the kitchen ceiling repair work was done. The Tribunal directs the Program to pay the Grads the sum of \$200.00 in respect of this item.
- (8) With respect to the complaint as to the living room bay window scratches, the Tribunal accepts Mr. Price's evidence that the scratch, if it exists, was too minor to be observable. This claim is disallowed.
- (9) The Grads paid a premium of \$3,245.00 to the builder to upgrade the ceramic tile in their kitchen and front hall area. A number of these tiles were scratched and chipped, and a number have not been laid flush with the surrounding tiles. A proper repair is not possible since it is now impossible to obtain matching



replacement tiles. The Tribunal finds that these floors were not laid in a satisfactory workmanlike manner. The Tribunal directs the Program to pay the Grads the sum of \$1,000.00 as compensation for this item.

- (10) The Program has undertaken to re-attend to reinspect the fireplace and the Tribunal directs the Program to reinspect and to repair the fireplace so that the water leakage is eliminated.
- (11) The Program has also undertaken to re-attend to reinspect the bay window leak and the Tribunal directs the Program to reinspect and to repair the bay window so that water leakage is eliminated.
- (12) Finally, with respect to the upstairs shower stall, again this is an item where repairs were carried out to correct a previous deficiency that had been reported to the Program. The retiling was not done in a workmanlike manner and the Tribunal directs the Program to pay the Applicants the sum of \$500.00 as compensation.

In summary, therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program as follows:

- 1) To pay to the Applicants the sum of \$1,964.41 in respect of items 1, 3, 4, 7, 9 and 12.
- 2) To repair items 2, 6, 10, and 11.

The remaining claims, in respect of items 5 and 8, are disallowed.

CLEMENT and SABIHA HAZELL

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, QC, Chairman, Presiding  
TIBOR GREGOR, Member  
DON MACFARLANE, Member

APPEARANCES:

CLEMENT and SABIHA HAZELL, on their own behalf

CAROL STREET, representing the Ontario New  
Home Warranty Program

DATE OF

HEARING: 18, 23 April and 3 August, 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program given June 10, 1989 disallowing the six outstanding claims of Mr. and Mrs. Hazell concerning interior matters in their home at 576 Stroud's Lane in Pickering. The claims are based on Section 13(1) of the Ontario New Home Warranties Plan Act.

Clement and Sabiha Hazell are one of seven claimants who have complaints about the quality of the brick-work of their respective homes in a subdivision project built by Brandy Lane Homes. Those claims are being heard by this Tribunal but in addition, Mr. and Mrs. Hazell have certain interior claims which were refused by the New Home Warranty Program. The Tribunal is prepared to render a decision on those items. The evidence for each item and the conclusion which was reached by the Tribunal is set out as follows:

1. The current state of the kitchen floor is the major complaint of Mr. and Mrs. Hazell. The main problems were set out by their consultant Kaius Meipoom, P.Eng, of Arcon Engineering Consultants Limited, who stated in his report as summarized:

" We observed that the kitchen floor was not level. A high area existed approximately in the centre of the breakfast area in the kitchen.

The aforescribed high area in the kitchen was observed to be due to some kitchen floor joists being at a higher elevation than others. This discrepancy in elevation was probably due to a steel beam supporting the joists, being installed at a higher elevation than the sill plate on foundation wall. Vinyl flooring in the kitchen was installed non-parallel with respect to walls - poor workmanship. Two floor joists under the kitchen floor had been cut, in order to lower the joists, and a restoration of support capacity of the cut joists had been attempted by a lap joint with a 2" nominal plank. The support capacity of the joists has been reduced below the requirements of the Ontario Building Code."

Mr. Meipoom in his oral evidence, gave measurements of the floor being off level by 3/8" in a distance of 4'.

Mr. Hazell recalled his complaint about the kitchen floor from his letter of 83 items sent to the builder on May 19, 1988; just less than a year after taking possession of the property on May 28, 1987.

The floor was taken up and the sub-floor was planed, but without success. Also joists were cut from below and were then shimmed, but that also did not work. When new vinyl was installed, the pattern was off parallel since one wall was slightly off-square.

Repairs to the floor were attempted as a matter under warranty by the Warranty Program; and in a further report dated May 18, 1989 is noted:

Complaint: Kitchen floor, joist of plywood are rising up along floor, is not level by dishwasher area and cut on vinyl floor

Observation: This area has been previously repaired but not in a good workmanlike manner. There are humps and bad seams in kitchen area.

After repairs, the Warranty Program concluded that the variance on measuring was within accepted tolerances as to being level.

The Tribunal finds that the repairs from the top and from beneath the kitchen floor have not resolved the problems complained of by the owners in a good workmanlike manner. The Tribunal directs the Warranty Program to obtain estimates to properly level the kitchen floor which may include clearing the room; lifting the vinyl and subflooring and also effecting repairs to the joists from below. If the vinyl is replaced, a type without pattern of equal value as chosen by the owners is to be installed which will avoid the problem of the one wall being slightly off square.

2. Mr. Hazell replaced the threshold of his ensuite shower stall with a marble sill. While so doing, he observed some damp areas behind the lower rows of tiles which he had removed. The Warranty Program states that while the tiles were slightly unevenly placed, there was no leakage other than perhaps through spaces in the tile grouting which would develop after two years of daily use.

The complaint was first reported on July 6, 1989; more than two years after taking possession. The Tribunal finds that this matter is not a major structural defect and is not warrantable since it was not reported within a year of taking possession of the property. The Tribunal directs the Warranty Program to disallow the claim.

3. While repairs were being made to the ensuite shower, the Hazells used the main bath and noted a resulting water stain on the ceiling in the dining room below. There may well have been some water leaking from the showerhead joint behind the shower wall. The Tribunal must apply the same principles here as in the prior item. Since the problem did not appear and was not reported within the first year of occupancy and since this is not a major structural defect, the Tribunal must direct the Warranty Program to disallow the claim.

4. Complaints concerning squeaking floors were made in the letter of May 19, 1988; and this was acknowledged to be a warrantable item in the conciliation report in certain locations. As the problem remains in the second floor hallway, the Tribunal is of the opinion that a thorough inspection of the whole complaint should have found and then repaired the problem. This was a proper first-year warranted complaint and is to be repaired. The Tribunal directs the Warranty Program to fix the squeaky floors as complained of by the Hazells.

5. A bulge in the stair wall was complained of within the first year and is referred to in the letter of May 19, 1988; but this is said to be non-warranted in the inspection report of May 18, 1989. The problem is likely due to a bent wall stud against

which the drywall was installed. The Warranty Program states that any deviation is within normal tolerances. The Tribunal finds that the workmanship here is not of a sufficiently low standard as to have a warranted claim and this is also not a major structural defect. The Tribunal directs the Warranty Program to disallow the claim.

6. The final complaint concerns the variance in the colour and texture in the tiles in the ensuite bathroom. This was referred to in the letter of May 19, 1988; but was not agreed to in the conciliation report as a warranted item where the replaced deck was seen to be acceptably done, although with a slight variance in the tile colour. Slight differences were seen by the various witnesses for the Warranty Plan with respect to colouration.

The Tribunal understands that the horizontal surface of the bath tub surround uses floor tiles which all match and that the vertical surfaces use wall tiles which all match each other. The variances apparently are due to some dye lot differences and the Tribunal finds that there is no warrantable defect in the tiles. The Tribunal directs the Warranty Program to disallow this claim.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that the Ontario New Home Warranty Program allow the claims with respect to the kitchen floor being unlevel and with respect to the floor squeaks on the second floor; and that the Warranty Program disallow the other four claims advanced by the applicants.



PRAKASH NATH KHANNA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 28 November 1990

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. The Applicant was sent by registered mail the Appointment for and Notice of Adjourned Hearing dated the 17th day of August, 1990 as evidenced by Exhibit 7, which stated:

...hearing will be held...before the  
Commercial Registration Appeal Tribunal in  
the Tribunal's chambers, 1 St. Clair Avenue  
West, Toronto on Wednesday, November 28th,  
1990 at 9:30 o'clock in the forenoon...

which contains the further notice:

...If you do not attend at the hearing, the  
Commercial Registration Appeal Tribunal may  
proceed in your absence and you will not  
be entitled to any further notice in the  
proceedings.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. E. LACIKA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
D.H. MacFARLANE, Member

APPEARANCES:

E. LACIKA, appearing on their behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 19, 23 January 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Edward and Jozefina Lacika from the decision of the Ontario New Home Warranty Program disallowing their claim for damages. The claim arises out of the construction of a home in Cobourg by Geranium Homes (Cobourg) Ltd., hereinafter referred to as Geranium, with whom the Lacikas had entered into a contract on the 14th day of January, 1989.

Under the Agreement of Purchase and Sale, the Lacikas were purchasing a home to be constructed by Geranium at a cost of \$167,990 with deposits to be paid by April 12th, 1989, in the sum of \$12,500. The balance of the purchase price was to be paid in cash on closing with the Lacikas obtaining a mortgage through the Toronto Dominion Bank, the mortgagee usually used by the builder. The Offer called for closing on the 14th day of August, but this was extended by consent of both parties to September 15th, 1989. Time remained of the essence.

It is to be noted that there was some confusion between the parties at a later date as to whether Lacika would accept the financing through the bank as contemplated by the contract or whether he intended to finance the transaction personally but through the same bank. It is not, however, material to our decision because most of the funds were available at the bank on the date reserved for closing leaving approximately \$30,000 to be paid by Lacika to his solicitor.

It is also to be noted that the solicitor for the bank was also acting on behalf of the builder. The arrangement becomes unsatisfactory only when there is a falling out between the parties.

For various reasons, Lacika who had apparently kept a close eye on the construction became disenchanted with the builder's workmanship. One of the reasons may have been an article he read in the Cobourg Daily Star by one Robert Washbern dated July 18th, 1989, whom he called as a witness. Washbern had been critical of some building methods in the Town's new subdivisions noting that the Ontario Building Code set out only minimum standards being concerned only with structural details.

It appears that Lacika identified his as one of the problem houses, inferior in quality and workmanship.

On August 1st and August 18th, Lacika wrote to the Ministry of Housing including in one of his letters a copy of the article. The Ministry answered on August 18th setting out its view of the situation as follows:

Ministry  
of  
Housing

Building Branch  
777 Bay Street  
2nd Floor  
Toronto, Ontario  
M5G 2E5  
(416) 585-6666

August 18, 1989

Mr. Edward Lacika, P.Eng.  
849 Westwood Crescent  
Cobourg, Ontario  
K9A 5B3

Dear Mr. Lacika:

Thank you for your letters received August 1 and August 16, 1989. The Minister of Housing, the Honourable John Sweeney, has requested that I respond to you on his behalf.

Members of my staff have contacted the municipality and have been advised that the top of the poured concrete foundation wall is definitely not level. We have been assured by the Chief Building Official that

this matter will be resolved in accordance with the intent of the Ontario Building Code during the course of construction.

In regard to your request for an inspection carried out by the Minister of Housing, it is established within the Building Code Act (Chapt.51, Sec.3.-(1) that "The Council of each municipality is responsible for the enforcement of this Act in the municipality". The Ministry of Housing has no jurisdiction for the enforcement of the Act or the associated Regulations within a municipality; however, we have raised your concerns with the municipality and we have been assured of compliance with the Building Code.

Your complaints about the substandard workmanship appear from the photographs to be valid; however, the Building Code does not address the subjective area of work quality. It is intended to be a minimum standard with respect to the safety of buildings regarding public health, fire protection and structural sufficiency.

As indicated in the newspaper article you sent us, the New Home Warranty Program is specifically designed, to protect home buyers against shoddy workmanship and to address the more major safety and structural items in the Building Code.

For your information, my staff have spoken to Mr. Roger Adams of the New Home Warranty Program, Whitby office, regarding your complaints. He indicated that if you write to him with your complaints, he could contact the builder to inform him of the requirements of the New Home Warranty Program. He may be able to alert the builder to the fact that major items of workmanship will eventually have to be rectified. The address of the Whitby office is:

114 Dundas Street  
Suite 201  
Whitby, Ontario  
L1N 2H7

Thank you for bringing your concerns to our attention and I trust that the problems you have encountered will be resolved in a satisfactory manner.

Yours truly

D. Hodgson  
Director  
Ontario Buildings Branch

As a result, the New Home Warranty Program entered the picture and made an inspection of the home on September 8th. The findings of a Mr. Thurston who wrote Lacika on September 11th follow:

**ONTARIO NEW HOME WARRANTY PROGRAM**

114 Dundas Street East, Suite 201, Whitby, Ontario L1N 2H7  
Phone (416) 668-6462 . FAX (416) (668-3064)

September 11, 1989

Mr. Edward Lacika, P.Eng.  
849 Westwood Crescent  
Cobourg, Ontario  
K9A 5B3

Dear Mr. Lacika:

On September 8th, 1989, personnel from the Ontario New Home Warranty Program visited the home under construction on Lot #136 in the Town of Cobourg. It is our understanding that you have entered into an agreement to purchase this subdivision home, which is scheduled to close on September 15, 1989.

The visit was made at the request of the Manager of the Whitby Regional Office and with the agreement of the builder, Geranium Homes. We understand from your



correspondence and conversations with Mr. Adams that your main concern is substandard workmanship which has resulted in an uneven foundation wall to attach the sill plate to, and the south west corner of the structure which is not plumb. Both of these items were examined and in regards to the top of the foundation, the builder has carried out repairs by packing the voids between the foundation wall and the sill plate with mortar. This type of repair when properly done is an acceptable method used in the industry. The builders site superintendent has agreed to repair the south west corner to correct the problem there.

As the home was completed to the point of only the final touch ups to be done, the Warranty Program from a visual inspection found very few items that we felt need attention. We agree that some of the trades left some substandard workmanship, but we also note that the builder has taken steps to correct any areas where problems might arise.

We note that in your correspondence, you have expressed a deep concern about the overall workmanship, the Municipal inspection process and the limits of the Ontario Building Code. As you are aware, the Ontario New Home Warranty Program has no enforcement powers while construction is in progress, we can only advise the local building official of our findings.

We found no structural faults and no safety items ignored, however, if you feel that unit on the above lot does not meet up to your expectations, we can only suggest that you ask Geranium Homes to relieve you of your commitment to them.

Yours truly  
 "Christine Bougourd"  
 Lorne S. Thurston  
 Consultant  
 LST/cmb

cc: Mr. Feiner, Geranium Homes

Mr. P. Linton, Director of Building and Standards, Cobourg

Mr. D. Hodgson, Director of Ontario Buildings Branch, "

B.W. Baxter, Chief Administration Officer, Cobourg

The suggestion in the last paragraph of Mr. Thurston's letter that if Mr. Lacika did not find the unit up to his expectations, he might ask Geranium Homes to relieve him of his contractual obligation apparently did not find favour with Mr. Lacika. He testified that as of that date, the home had increased in value by some \$17,000 which now forms part of his claim for damages.

The builder, who was at that point equally disenchanted with Lacika might have done so and it apparently would have been to his advantage, but no such request was made. It is also to be noted that Mr. Lacika still had his own house to which he could have returned in the event of the termination of the contract.

Mr. Lacika then employed the firm of Baker Street Inspection Services Inc. to inspect the home and its report was completed on September 13th. The most relevant findings are as follows:

#### ADDITIONAL COMMENTS

The following opinions are based on photographs taken by Mr. Lacika during the framing stage of construction.

The foundation wall was not completed to provide level and even bearing for the wood sill plate. As a result, wood shims were used to level the sill plate to facilitate framing. The gap between the sill plate and the foundation was subsequently grouted. It is recommended that this area be reviewed to ensure that the gap is suitably filled with grout to provide assurance to the new homeowner that this detail was completed in a good workmanlike manner.

The remaining thirty-five items on this Report are of a minor nature, largely involving cleaning and patching up. The main thrust of the report is embodied in the following two paragraphs.

There is an average amount of work required to complete details of construction of this dwelling.

In the most part this house has been constructed in a manner which reflects good building practices.

At the same time, the Pre-Delivery Inspection Report was completed on behalf of the builder and in the presence of Mr. Lacika who signed it. This report reflects no structural defects or major deficiencies in the building. The water had not been turned on due to a crimp in the copper pipe caused by a grader, but that was replaced the following day.

Also in attendance was the Building Inspector from the Town of Cobourg who had intended to make his final inspection for the Occupancy Permit. He did not, however, complete his inspection until the following day when the water was turned on and issued the Occupancy Permit on September 14th.

The Report and Occupancy Permit are set out on the following two pages.



# THE CORPORATION OF THE TOWN OF COBOURG

## BUILDING INSPECTION REPORT

Bldg. Dept.  
55 King St. W.  
Cobourg, Ontario  
K9A 2M2

Telephone: 372-4301

Applicant EVANINA - HOMES Date 12/09/84 Time 11:53 a.m.  
Location 892 CHIPPING PK BLVD LOT 136 Permit # 241 84  
Subject of Inspection: FINISH

AN INSPECTION AT THE ABOVE LOCATION DISCLOSES THAT THIS PROJECT/PROPERTY DOES NOT CONFORM TO:

- ( ) Ontario Building Code  
( ) Local By-law ( # )

Deficiencies:

PATCH TILES IN BATH ROOM

12/10/84

Paul L. L. L.

PERMISSION TO COVER: Granted ( ) Denied ( )

Comments:

REQUESTED REINSPECTION: Date \_\_\_\_\_ Time \_\_\_\_\_ a.m.  
p.m.

[Signature]  
Signature of Person Notified

[Signature]  
Signature of Inspector

WHITE - APPLICANT . YELLOW - OFFICE

SEP 15 '89 09:17 GERANIUM HOMES 416 491 3315

P.2/3p.2/12

From a/c system - PRESS FIRMLY - No Carbon Required

## OCCUPANCY PERMIT

Building Code Act, R.S.O. 1960, c. 31, s. 7, O. Reg. 41/2/74

Name of Municipality Town of Cobourg Phone 372-1005Applicant GERANIUM HOMESBuilding location 802 CHURCH ST. P. 24189Construction Permit No. 24189Portion of building approved for use ALL

PERMISSION is hereby granted to the above named applicant to use and occupy the building at the above location which the applicant has stated has been constructed in full compliance with all the provisions of the Building Code Act, and regulations and orders made thereunder and of any by-law, or amendments thereto of the municipality which in part or in whole regulates the structural requirement, the erection, situation, location, use etc. of building and is

☐ fully completed

OR

☐ partially completed and ready for new residential occupancy in accordance with Article 2.4.3.1 (1) and (2) of the Code.

OR

☒ partially completed and ready for residential occupancy in accordance with Article 2.4.3.2 (1) of the Code.Date permit issued 14/09/89

Green Copy - APPLICANT

Date (Issued) Official 14/09/89

White Copy - OFFICE

SEP 15 '89 9:20 416 491 3315

PAGE.002



The following day, Friday, September 15th was the date which the transaction was scheduled to close. Mr. M. Harrison, Lacika's solicitor spoke by telephone at 11:15 a.m. to Mr. Shankman, solicitor for both the builder and mortgagee. The conversation is reflected in their correspondence which has been introduced in evidence.

Mr. Shankman, whose office was in Toronto, had sent a letter by Fax to Mr. Harrison confirming their conversation and advising he was ready to close since he had an Occupancy Permit.

September 15, 1989

Via Fax to 1-885-7474

Brooks, Harrison, Mann & Associates  
Barristers and Solicitors  
114 Walton Street,  
Port Hope, Ontario  
L1A 1N5

Attention: M.C.J. Harrison, Esq.

Dear Sirs:

Re: Geranium Homes (Cobourg) Ltd. sale to Lacika,  
Lot 136, Plan 455, Cobourg

This is to confirm our telephone conversation of 11:15 a.m. today as follows.

You advised me that you were advised by your client that there were some 30 to 40 "deficiencies" in the interior of the home and that accordingly he was allowing the Vendor the next two weeks to rectify them and complete this transaction.

You also advised me that your client advised you that he had told the vendor, quite some time ago, that he was not taking the Vendor's Arranged Mortgage [with the Toronto-Dominion Bank] and accordingly the reference to the mortgage principal and mortgage arranging and legal fees should not form a part of the Statement of Adjustments.

In response to my inquiries you advised me that you did not have any details of the "deficiencies" as alleged by the client and your client had not provided you with any funds with which you could complete this transaction.

I advised you that at the instigation of your client the property was previously inspected by your client, a representative of the Vendor, an inspector from the Building's Department for the Town of Cobourg, and a representative for the Ontario New Home Warranty Program. Save and except for your client's opinion I am advised that there were no "real problems" with the house construction and that only a relatively few of the usual construction deficiencies existed at that time.

I further advised you that we have a copy of the Report of the Building Inspector dated September 13, 1989 which indicates only one deficiency, namely, "PATCH TILE IN BATHROOM". We expect to have a report from the Warranty Program shortly which we anticipate will also confirm that there were few, if any, deficiencies, being minor in nature.

I further advised that we are in possession of a copy of the Occupancy Permit issued by the Town of Cobourg to the Vendor on September 14, 1989  
copy enclosed.

I confirmed that I advised you that, based upon the foregoing, I saw no reason why this transaction should not be completed today. In fact, the Toronto-Dominion Bank has advised us that they had approved your client as a borrower in the amount that he applied for in accordance with the Agreement of Purchase and Sale, had previously given us written instructions to act on their behalf and proceed with the funding, and is in the process of delivering the mortgage proceeds to us.

You did advise me that your client was to attend at your office in the early afternoon to provide you with a list of the alleged "deficiencies" and you further stated that you will contact me at that point in time to provide you with details.

I made it clear to you that, since we have an Occupancy Permit in hand, I did not think that the alleged "deficiencies" should prevent us from completing the transaction today.

Our closing file is now in the Cobourg Registry Office and we are ready, willing and able to complete the transaction.

Would you please contact our office prior to 2:30 p.m. today to advise us of the following:

1. Whether your client confirmed his instructions to you that he has arranged his own financing and had advised the Vendor and the Toronto-Dominion Bank (in sufficient time) that he would not be completing financing arrangements as set out in the Agreement of Purchase and Sale (and bank documents which he may have executed in accordance therewith).

2. Whether your client has provided you with the funds required to complete this transaction today.

3. The nature of the alleged "deficiencies". Please note that it is our opinion that the receipt of an Occupancy Permit satisfies the Vendor's obligations which are pre-requisite to the completion of this transaction.

If we have not heard from you at or about 2:30 p.m. today, our instructions are to attempt to complete this transaction as scheduled.

I respectfully await your timely reply.

Yours very truly,

ROSENBERG, SAUL, LAMBERG  
SHANKMAN & CHADWICK

Per:

Jeffrey P. Shankman  
JPS/ss

encl.

c.c. Geranium Homes (Cobourg) Ltd.

This was followed by Mr. Lacika's attendance at Mr. Harrison's office to deliver the following instructions:

To: Mr. M. Harrison  
From: E. Lacika

Mike, please advise the solicitor of my builder, that me and Josefine are not going to take possession of our contracted house today on Sept. 15/89.

Reason:

PDI - done Sept. 13/89 revealed excessive amount of defficiencies (sic), which are listed in PDI report, and my inspector's report. It doesn't meet 97% completion and Jozefina insist to get the interior items repaired before the possession of the house take place. We can accept a delay of completion of the exterior for a reasonable time.

Enclosed: 2 copies of reports.

Thank you.

E. Lacika

Mr. Harrison replied by FAX to Mr. Shankman reflecting the instructions of his client.

September 15, 1989

Rosenberg, Saul, Lambert, Shankman & Chadwick  
Barristers etc.  
Suite 315  
7100 Woodbine Avenue  
Markham, Ontario L8R 5J2

Attention: Jeffrey P. Shankman, Esq.

Dear Sir:

Re: Lacika p/f Geranium Homes

This letter will confirm our telephone conversation this morning regarding the above transaction.

This letter will also confirm our advice that our clients are not agreeable to closing the transaction until the vendor has completed the interior of the residence in accordance with the contract.

We are enclosing herewith a copy of the Geranium Homes pre-delivery inspection, and a copy of the report from Baker Street Homes Inspection Services Inc. which inspection was completed yesterday.

This letter will also confirm our advice that we are advised by Mr. and Mrs. Lacika that they informed the vendor when entering into the contract that they did not require any mortgage and that this would be a cash transaction and both these adjustments should be deleted from the Statement of Adjustments.



Mr. and Mrs. Lacika are agreeable to allowing the vendor an extension of the closing date for two weeks to enable the vendor to complete the interior of the house.

Yours very truly,

BROOKS, HARRISON, MANN & ASSOCIATES  
"M.C.J. Harrison"

MCJH:PAP  
Encl.

Mr. Shankman's file had been directed to his agent in Cobourg in preparation for closing. Since no one appeared at the Registry office on behalf of Mr. Lacika, the agent attended at Mr. Harrison's office and tendered upon him. At that point the vendor's solicitor considered the contract had been breached and on September 19th, the following Tuesday, delivered a letter by Fax to Mr. Harrison to that effect.

September 19, 1989

DELIVERED VIA FAX (885-7474)  
& MAIL

Brooks, Harrison, Mann & Associates  
Barristers and Solicitors  
114 Walton Street,  
Port Hope, Ontario  
L1A 1N5

Dear Sirs:

Re: Geranium Homes (Cobourg) Ltd. sale to Lacika,  
Lot 136, Plan 455, Cobourg

This transaction of purchase and sale was scheduled to be completed on September 15th, in accordance with the terms and provisions of the Agreement of Purchase and Sale and the Amendment dated January 14th, 1989.

On September 15th, Mrs. Smith of our office spoke with Mr. Harrison and at that time, he advised her that he was not in a position to complete the transaction as the clients had not provided your firm with any funds with which to complete payment of the balance due on closing.

Our agent attended at your offices at or about 4:50 p.m. on September 15th and tendered our closing documentation. Your firm did not tender the closing funds and, we take the position that we were ready, willing and able to complete this transaction on the date of closing but that your clients did not complete the transaction and were not in a position to do so.

You are hereby notified that by virtue of the fundamental breach of contract by your clients, this transaction has been terminated and all deposits have been forfeited.

Our client reserves all of its rights to make additional claims for losses or damages arising out of the Agreement of Purchase and Sale contract and at common law.

Kindly advise your clients to govern their conduct accordingly.

Yours very truly,

ROSENBERG, SAUL, LAMBERG  
SHANKMAN & CHADWICK  
per:  
Jeffrey P. Shankman

JPS/fmv  
c.c. Geranium Homes (Cobourg) Ltd.  
current/tender.cob

Paragraph 1(s) of the Contract refers to tender as follows:

The parties waive personal tender and agree that tender shall be validly and effectively made if the tendering party shall attend at the Registry office in which the title to the real property is recorded at 12 o'clock noon on the date of closing and for a period of 1/2 hour thereafter is ready, willing and able to close. Alternatively, tender may be validly and effectively made upon the designated solicitors for the party being tendered. Payment must be made or tendered by certified cheque drawn on any Canadian chartered bank or trust company.

There was no evidence given on the exact time the vendor's agent was in the Registry office prepared to close, but Mr. Shankman's letter of September 15th reflects his delivery of the file to his agent prior to 12:50 p.m. on that date. In any event, the agent attended at Mr. Harrison's office that afternoon prepared to close and we are of the view that proper tender was made.

In his evidence, Mr. Lacika testified that he did not consider the house 97% complete on the day set for closing. He telephoned a Mr. Angelo Bianci, a representative of Geranium at 9.15 a.m. on the 15th and asked for an extension of closing for two weeks. Bianci refused saying, "No, you will lose the house". Subsequent to that conversation, Mr. Lacika attended at his solicitor's office with instructions not to close.

There is evidence that on the 19th of September, Mr. Lacika had reconsidered his position and instructed the Toronto Dominion Bank to make an inspection in order to advance the funds. The inspection disclosed that the house was 97% complete and the bank was prepared to advance the funds. One Larry Boxall, however, had testified that he attended at the premises on September 13th as the Site Supervisor for Geranium when Mr. Lacika was present at that time. He said only the usual things required to be finished as in any new home. He further said he sent no workers to the site after September 15th because the transaction had not closed. If there was no work done between the 15th and 19th when the bank's inspection was made, we must conclude the house was in the same condition on the 15th as it was on the 19th and on the latter date, it was 97% complete. In any event, according to a letter from the bank to Mr. Shankman, the funds were available to be advanced on September 15th; this letter was dated November 8th, 1989.

A Mr. Paul Linton and a Mr. Frank Lukes were called by the Program. They are both building inspectors for the Town of Cobourg. Lukes attended at the premises on September 14th and only noted some tile in the bathroom not repaired. Linton, who made his inspection at the same time, pointed out that the only deficiency he noted was the bathroom tile. The Inspection Report and Occupancy Permit of September 14th appear to corroborate this evidence.

After the transaction had been terminated, it appears Mr. Lacika attempted to ressurect it on the 26th day of September and has introduced his solicitor's docket as evidence of that intention. The docket indicates the builder was not receptive to whatever overtures were made

LAWYER'S DOCKET

LACIKA, Ed

Client	Opposite party
Address	Address
Type of matter	Solicitor
Court	Address

<u>DATE</u>	<u>PARTICULARS</u>	<u>Time spent</u>	<u>Charge</u>	<u>DR</u>	<u>CR</u>
-------------	--------------------	-----------------------	---------------	-----------	-----------

26 Sept.89 to Mr. Shankman

- spoke with Lacika on 25th
- Lacika spoke to Rumm
- Shankman spoke to Rumm: Rumm said no deal  
They don't want to do business with him.
- Shankman wouldn't postpone closing because  
they got an occupancy permit.
- Lacika did not put Harrison in t/ with S which  
he should have done if he wanted to pursue  
deficiencies
- Lacika has done this with other properties
- Best offer: token of deposit \$500.00 if he  
signs release.

This is an unfortunate case in which the Applicant has clearly suffered a loss which, in our view, could easily have been avoided. Mr. Lacika is an engineer and by virtue of that profession may have expected perfection in the builder. He was aware, however, at least by his contact with the newspaper and correspondence with the Ontario Housing Ministry that perfection is not a necessary concomitant of the building trade. He was also aware of the provisions in the contract permitting the builder time to complete any deficiencies after closing. He also knew he had recourse under the Ontario New Home Warranty Program for either compensation or repair of any deficiencies. He had employed an independent firm to inspect the property whose report was not unfavourable to the builder. He had counsel in the person of Mr. Harrison, but it appears he neither sought nor would be governed by advice.

He also knew the builder intended to close on September 15th. Shortly after the contract was terminated, he took his file from Mr. Harrison's office and retained another solicitor. There is no evidence which can lead us to believe that Mr. Lacika intended to close this transaction until after it was terminated by the builder and he had lost his deposit.

The breach of contract was clearly the result of one of the parties, not being either ready or willing to close or both. In our opinion, each were able to close had Mr. Lacika deposited his funds with his solicitor on September 15th. Since he had signed no mortgage documents which had been directed to his solicitor, no directions and deposited no funds with his solicitor, we must conclude Mr. Lacika was neither ready nor willing to close, but on the other hand adamantly refused to close according to the instructions he gave his solicitor on September 15th. It is also clear from his evidence that he was aware of the consequences since the builder had advised him no request for extension would be considered.

We, therefore, find on all the evidence that the breach of contract was occasioned by the refusal of the Applicant to perform.

Mr. Lacika's claim has been brought under Section 14(1) of the Ontario New Home Warranties Plan Act which reads as follows:

14(1) Where

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor



for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

.....

The cause of action contemplated by Mr. Lacika is founded on the vendor's failure to perform the contract. Although he had many complaints not infrequently expressed, Mr. Lacika brought no evidence before us of any that go to the root of the contract or which would give him reasonable cause to refuse to perform. We find no breach of contract by the vendor, although ultimately there may have been a breach of warranty if all the deficiencies alleged had not been eventually addressed. The Program, however, would have required the vendor to complete these after further inspections.

We find no breach of contract by the vendor. Since we find no breach of contract by the vendor, the Applicant's claim for damages under Section 14(1) of the Act must fail.

We now turn to the question of damages.

On October 9th, Mr. Lacika wrote to Mr. Barry J. Rose of the Ontario New Home Warranty Program claiming damages as follows:

Edward and Jozefina Lacika  
849 Westwood Crescent  
Cobourg, Ontario  
K9A 5B3

Oct. 9, 1989

Ontario New Home Warranty Program  
North York City Centre  
North East Tower, 6th Floor

5160 Yonge Street  
North York, Ontario  
M2N 6L9

Attention: Mr. Barry J. Rose, President of the  
Ontario New Home Warranty Program

Subject: Claim of Damages caused by inspection done by  
consultant of the Ontario New Home Warranty  
Program, Mr. L.S. Thurston on Sept. 8, 1989  
in Cobourg. Lot #136 Geranium Homes Site

Dear Sir:

.....

Following damages were caused to us, as of Sept. 19,  
1989, because of Mr. L.S. Thurston in favour to  
Geranium Homes done inspection:

- Forfeited Fee	\$12,500
- House price increase for period Jan.12, 1989 to Sept.15, 1989	17,100
- Solicitor Fee	717
- House inspection by Mr. Clarke	350
- Toronto Dominion Bank appraisal and inspection	190
- Our existing house sale advertisement	200

---

31,057

Mr. Barry J. Rose, we are claiming \$31,057  
to be reimbursed to us by the Ontario New  
Home Warranty Program.

Sincerely yours

"Ed Lacika"  
"J. Lacika"

Enclosed 7 copies of letters  
8 pictures

In that letter he claimed damages in the sum of \$31,057.00. Shortly thereafter on November 6th, he brought a claim before the Tribunal for the sum of \$34,268.00. We do not know where the disparity lies, but it is not material to our decision. The Applicant's claim is brought under Section 14(1)(a) of the Ontario New Home Warranties Plan Act and under Section 6(1) of Regulation 726, the latter of which reads as follows:

- 6(1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

The section, of course, provides for a breach of the contract by the vendor and the maximum that can be awarded in damages is \$20,000. In the matter before us, we find as a fact that there was no breach of contract by the vendor, but on the contrary by the purchaser, the Applicant.

Had the vendor been in breach of the contract, the Applicant's remedy at law would have been to sue for specific performance and if the vendor could not have performed at that time, then the alternative claim for damages was available to him. The evidence, however, reflects that the house had not been sold and the purchaser's claim for specific performance could probably have succeeded. The alternative claim for damages, however, was open to him if specific performance could not have been achieved.

Since, however, this is a claim under Section 14(1)(a) of the Act, our decision is restricted to the determination of whether or not the Applicant has a cause of action against the builder. We find he has none under the Act. Had we determined otherwise, we would have allowed a claim for \$20,000.00 in damages.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.\*

\* The above decision was appealed to the Supreme Court (Divisional Court). The appeal had not been concluded at the time of this publication.

JUSTIN AND MICHELE LI

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

MICHELE LI, appearing on their behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 4, 12 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered January 18, 1990, disallowing certain claims of Mr. and Mrs. Justin Li arising from the construction of their home by Greenacre Estates. The claims are based on section 13(1)(a) of the Ontario New Home Warranties Plan Act and section 6(7) of Regulation 726 under the Act.

Michele Li and her husband Justin testified together. They said that in October 1988, they bought Lot No. 12, 41 Lagani Avenue in Richmond Hill, from Zoltan and Nada Ladi (see Exhibit 3(A)). In the same transaction, the Ladis assigned all rights they had with respect to a contract for the construction of a home on the property by a numbered company also known as Greenacre Estates.

The said contract was entered into on March 27, 1987. Annexed to the contract, and forming part of it, was a document entitled "Quality Features" which was, in effect, a list of specifications of the different features and finishings which the home would contain. They all form part of Exhibit 3 and constitute the building package which the builder undertook to construct and deliver to the eventual purchasers of the lot.

At the time the Lis entered into their agreement with the Ladis, the home was approximately 80 per cent completed. It had still never been occupied.

As appears from the Deed of Assignment, the parties agreed to the same closing date as that agreed upon between the Ladis and Greenacre Estates. Greenacre Estates was not given notice of the Assignment, but at all material times never contested it, and in their dealing with the Lis implicitly accepted their status as the new owners.

The Lis made a \$20,000 down payment against a purchase price of \$357,000; the closing date was to be October 31, 1988.

The Lis testified that in October 1988, they went to the construction site and informed certain principals of Greenacre Estates that they had bought the home. The principals did not seem surprised. The Lis went to inspect the house five times before the closing date.

On November 16, 1988, Mr. Ladi and the builder filled out a Certificate of Completion of the home in the absence of any representative from the New Home Warranty Program. The Lis did not sign the Certificate, nor did they contribute to its completion, because only Mr. Ladi had contractual dealings with the builder. The Lis stated that the Certificate did not contain all the complaints they had with respect to the construction of the property. They noticed this on the closing date, December 2, 1988, when they saw for the first time the Certificate of possession. Their lawyer advised them to close or risk losing their deposit of \$20,000, but undertook to send a letter to protect their rights under the Ontario New Home Warranties Plan Act.

The lawyer sent the said letter, containing a list of deficiencies, on December 5, 1988 (Exhibit 8). On February 20, 1989, an additional list of deficiencies was sent.

The Lis moved into their home in late December 1988.

The builder did fix some of the deficiencies but refused or neglected to correct others. On February 20, 1989, therefore, the Lis filed a complaint with the Ontario New Home Warranty Program.

They received no response from the New Home Warranty Program and, therefore, phoned them on a continual basis to see what was happening. A representative of the New Home Warranty Program finally came on September 20, 1989, to inspect the home. At that time, they went through the items of complaint one by one.

A Conciliation Report was issued October 3, 1989, listing each complaint (Exhibit 3(G)). The Lis testified that most of the



complaints in the Conciliation Report were, in fact, corrected and only nine items remained in contention. These were items which the Ontario New Home Warranty Program refused to accept as warrantable under the Ontario New Home Warranties Plan Act.

We shall examine the testimony of the Lis, as well as of Mr. Bruce Stevens of the Ontario New Home Warranty Program in respect of each of the items. The Tribunal believes the following general principles govern the application of the Ontario New Home Warranties Plan Act in this case:

The Lis are considered owners within the meaning of the Ontario New Home Warranties Plan Act. Section 1(g) states:

"'Owner' means a person who first acquires a home from its vendor for occupancy, and his successors in title".

The Lis are successors in title.

The home itself comes within the provisions of the Ontario New Home Warranties Plan Act because the vendor, as defined in section 1(n), sold a home which had not previously been occupied.

The Lis are entitled to all stipulated warranties under the Ontario New Home Warranties Plan Act even though they had no contractual dealings with the builder. Section 13(5) of the Ontario New Home Warranties Plan Act states:

"A warranty is enforceable notwithstanding that there is no privity of contract between the owner and the vendor."

The Lis are also entitled to proceed against the New Home Warranty Program to seek satisfaction of any warranty claim. Section 14(1) provides that the Lis, as owners, are entitled to be paid out of the guarantee fund. In effect, the Ontario New Home Warranty Program must step into the shoes of the builder to satisfy the warranties given in the Ontario New Home Warranties Plan Act and the Regulations.

The Ontario New Home Warranty Program is obliged to warrant that the builder deliver a home built as specified in the contract, including the list of specified Quality Features. Everything listed forms the building envelope and binds the Ontario New Home Warranty Program as much as the builder with respect to those items which are warrantable.

The Ontario New Home Warranties Plan Act stipulates the warranties the Lis are entitled:

1. A warranty by the vendor and/or Ontario New Home Warranty Program that the home is constructed in a workmanlike manner and is free from defects in material.  
Section 13(1) of the Act.
2. A warranty by the builder and/or Ontario New Home Warranty Program that work on the home will be complete.  
Section 6(7) of the Regulation stipulates that "liability in respect of the cost of completion of a home is limited to 2 per cent of the sale price of the home or \$5,000, whichever is the greater."

It can be argued that failure by the builder to complete work he has undertaken to do in the construction of a home constitutes a failure to construct the home in a workmanlike manner; that is, it constitutes defective workmanship. Section 6(7) was apparently added to limit the amount that could be claimed under this heading.

It is to be noted that in 1988, section 20 of the Regulations added a warranty against substitutions in items of construction or finishings where such substitutions were to the detriment of the owner. This warranty does not apply to the Lis since they purchased their home prior to June 30, 1988.

Having set out the general principles, we shall now examine each item of claim by the Lis to decide whether they are warrantable under the Act.

#### ITEM 1: LOOSE SUB-FLOORING IN LIVING ROOM

This complaint appears as Item 7 in Schedule "A(1)" of Exhibit 3(g). As appears in the observation by the New Home Warranty Program, "loose sub-flooring was noted by the easterly area of the hall to the master bedroom's ensuite bathroom." The Lis testified that the sub-floor needs to be renailed. The New Home Warranty Program admits that this claim was warrantable because it constitutes defective workmanship. Under the circumstances, the Tribunal directs the New Home Warranty Program to see to the repair of the loose sub-flooring in the easterly area of the hall in order to remedy the defective workmanship.

ITEM 2: MASTER BATHROOM PLATFORM

This item appears as Item 1 of Schedule "A(2)" of Exhibit 3(g). The Lis complain that no tub deck was installed between the ensuite tub and shower stall whereas such a deck was installed to the right end of the tub area. The Lis believe that this area was not completed in accordance with the artist's conception of the floor plan.

The Program agrees that no deck was installed on the left side, but that the work was nevertheless complete as it stood. It represented a reasonable execution of the artist's general conception of the bathroom floor plan.

The Tribunal believes that the bathroom floor plan is complete as it now stands and represents a reasonable execution of the artist's conception. Under the circumstances, the claim by the Lis is dismissed.

ITEM 3: SUBSTANDARD WOODEN BASEBOARD WORKMANSHIP

This appears as Item No. 4, Schedule "A(2)". The Lis complain that the baseboard around the curved portion of the staircase in the foyer area was not installed in a workmanlike manner. They testified that its appearance was very unsightly. The current baseboard is assembled from small pieces which may be fitted to give the appearance of one piece. The Lis was assembled in an uneven way.

The New Home Warranty Program, through the testimony of Mr. Stevens, argued that it was a tight radius within which the baseboard had to be installed around the curved portion of the staircase and that it was, therefore, reasonable practice for it to be cut up in so many small pieces.

Having heard the testimony, the Tribunal believes that the installation of the baseboard manifested bad workmanship. The Tribunal, therefore, orders the New Home Warranty Program to see that the baseboard is removed and replaced by one which is assembled and installed in a workmanlike manner around the curved portion of the staircase in the foyer area.

ITEM 4: SUBSTANDARD ROOM TEMPERATURE

This is Item 9 of Schedule "A(2)". The Lis complain that the temperature in the west side bedroom is 3 to 5 degrees centigrade less than the thermostat temperature. The City of

Richmond Hill inspected the home and confirmed the problem.

The New Home Warranty Program inspected the home on September 20, 1989, a time in the year when a problem with the heating would not be able to be observed. In their testimony before the Tribunal, the Program agreed that the problem would be warrantable provided that the Lis clearly demonstrated what caused the problem.

The Tribunal finds that the Lis did not make satisfactory proof as to the cause of the problem with the heating. It might be advisable for the Lis to contact the Municipality of Richmond Hill to ascertain the exact cause of the problem and to, therefore, also learn what repairs must be done. In the meanwhile, the Tribunal reserves the rights of the Lis to make a further claim against the New Home Warranty Program with respect to this matter, since they have clearly demonstrated that there is a problem in this bedroom.

#### ITEM 5: INSUFFICIENT LIGHT FIXTURES IN HALLWAY

This is Item 13 of Schedule "A(2)".

The Lis testified that there was no light in the hallway despite an undertaking in the list of electrical features that interior light fixtures would be installed in halls. The Lis testified that they found the hallway very dark at night.

The New Home Warranty Program found that "the hallway has adequate lighting from the front foyer and family room" and that the lighting satisfied the Ontario Building Code.

The Tribunal finds that the lighting provided was sufficient inasmuch as there is a light in the foyer which forms part of the hallway.

#### ITEM 6: NO CASING/CORNERBLOCK IN ARCHWAY

This is Item 15 of Schedule "A(2)". The Lis complained that there was no casing/cornerblock in the archway between the family room and foyer. This item was promised in the Quality Features list of the builder. Under the heading "Interior Features" on page 1 of the Quality Features, Item 6, the builder undertook to upgrade the archway with upgraded colonial style baseboard and casing with cornerblocks on doors and archways.

The New Home Warranty Program observed that the archway to the family room from the front hall and to the ensuite sink and



counter area had not been trimmed with casing and cornerblocks. Rather, they had been finished with drywall and paint.

Mr. Stevens testified that the archway had been finished and was complete as it stood and that the Lis' complaint constituted more a complaint of substitution than of incomplete work and, therefore, was not warrantable.

The Tribunal finds that the Lis' complaint does not fall within the category of substitution, but rather constitutes a claim with respect to incomplete work. The Tribunal, therefore, orders the New Home Warranty Program to see to the finishing of these archways in the manner undertaken by the builder; that is, to have the archway to the ensuite sink and counter area and the archway to the family room from the front hall trimmed with casing and/or cornerblocks as practicable with the archways as they now exist.

ITEM 7: MIRRORS IN BATHROOM, VALANCE BOX IN DINING ROOM,  
SHOWER LIGHT IN SHOWER AREA.

This is Item 17 of Schedule "A(2)". The Lis testified that the vanity in their bathroom is approximately 6 to 7 feet in width. The builder undertook to install full vanity mirrors in all bathrooms excluding the powder room in his list of Quality Features. The Lis testified that the mirror was one piece and approximately 4 feet in width and was, therefore, not the full length promised by the builder.

The New Home Warranty Program agreed that the mirrors in the bathroom are not full width, but states that the claim of the Lis is not warrantable because it constitutes a substitution. They argue that the builder has substituted a smaller mirror for a bigger mirror.

The Tribunal holds that the failure of the builder to install a mirror that was the full length of the vanity constituted incomplete work and is, therefore, subject to warranty under the Act. The Tribunal, accordingly, orders the New Home Warranty Program to see to the installation of full vanity mirrors in all the bathrooms.

The Lis also testified that the builder failed to install a valance box in the dining room in breach of his undertaking in promised Quality Features. Item 16 of the heading "Interior Features" promised valance boxes in the living room and dining room.

The New Home Warranty Program testified that a valance box was not installed in the dining room, but the room was



neverthelss complete as it stood. It believes that the claim by the Lis constitutes a substitution and is, therefore, not warrantable under the Act.

The Tribunal finds that the failure to install the valance box in the dining room constitutes incomplete work and is, therefore, warrantable. Under the circumstances, the Tribunal orders the New Home Warranty Program to see to the installation of a valance box in the dining room.

The Lis also complained that no shower light was installed in the shower area. In the list of Quality Features under the heading "Bathroom and Laundry Features", Item 1, the builder undertook to install a shower light where applicable. The Lis testified that there was a light in the bathroom.

The New Home Warranty Program argued that no such light was required because there was sufficient lighting in the bathroom.

The Tribunal holds that the Lis are not entitled to a light in the shower area since it is not required.

#### ITEM 8: NO POP-UP PLUGS IN BATHROOMS AND POWDER ROOM

The Lis claim that the plugs installed were not pop-up plugs as promised by the builder in "Bathroom and Laundry Features", clause 3. They stated that in order to remove the plug to let the water escape, they must put their hands in the water and pull up the plug.

The New Home Warranty Program described the plugs as being manual pop-ups and stated that, in any case, the claim of the Lis was not warrantable because it constituted a substitution.

The Tribunal believes that the builder failed to complete the work promised in failing to provide pop-up plugs as required in the list of Quality Features. The plugs provided were not pop-ups and the New Home Warranty Program is, therefore, ordered to see to the replacement of the plugs with pop-ups in the powder room, main bathroom and ensuite bathroom.

#### ITEM 9: NO DOME LIGHTING IN KITCHEN

This is Item 20 of Schedule "A(2)". The Lis testified that the builder undertook, in his list of Quality Features under the heading "Kitchen Features", Item 1, to provide luminous dome lighting in the kitchen working area. The Lis understood that they

were to receive what is known as circumference lighting or dome lighting, viz. dropped lights which are florescent and form a circle, thereby giving the illusion of a dome in the ceiling.

Some time in February or March 1989, the builder informed the Lis that they were going to receive what is commonly known as dropped lighting or flat ceiling lighting, which the builder claimed was dome lighting.

The Lis refused to accept such lighting and visited the electrical supplier of the builder in order to receive an explanation of what constituted dome lighting.

The supplier, Futuristic Ceiling Inc., told them that dome lighting was what the Lis considered it to be and not the flat lighting that the builder intended to supply.

Under the circumstances, the Lis told the builders that they would not accept the dropped ceiling or flat lighting. When they took possession of the home, the kitchen was illuminated by one light bulb in a bowl fixture.

Similar explanations of what constituted dome lighting were given to the Lis by others in the industry.

The Lis, therefore, asked Futuristic Ceiling Inc. to proceed to the installation of luminous dome lighting in the kitchen and paid the company the sum of \$500 to do so (Exhibit 3f).

The New Home Warranty Program agreed that the Lis did not receive dome lighting, but that the work in the kitchen was complete; the Lis, they argued, had received a substitution in the lighting and their claim was, therefore, not warrantable.

The Tribunal holds that the claim of the Lis is warrantable under the Act because it constitutes a claim for incomplete work. The Tribunal believes it also constitutes work which was not carried out in a workmanlike manner.

The Tribunal, therefore, orders the New Home Warranty Program to reimburse the Lis the sum of \$500 which they paid to Futuristic Ceiling Inc. to install the dome lighting.

Pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal therefore directs the Ontario New Home Warranty Program to proceed to remedy the warranted items listed above and to reimburse the sum of \$500.00 to the Lis.\*

\*The above decision was appealed to the Supreme Court (Divisional Court). The appeal had not been concluded at the time of this publication.

MR. AND MRS. S. MACLEAN

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
LOUIS A. RICE, Member

APPEARANCES:

MR. AND MRS. S. MACLEAN, appearing on their own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 2 May 1990

Toronto

REASONS FOR DECISION AND ORDER

This was an appeal by the MacLeans in respect to the refusal of the Ontario New Home Warranty Program to allow a claim in respect to a septic tank system located on the MacLean's property. It was acknowledged by the Program that this claim is constituted as a major structural defect claim and is being made two and one-half years after the occupancy of the home and is, therefore, within the coverage provided by the Act.

The facts of the claim are that the original purchasers from the builder took possession of the property on June 30, 1986. The MacLeans purchased from the original purchasers in July 1988 with the purchase closing in November 1988. Included in the claimants' Agreement of Purchase and Sale was a specific provision whereby the original purchaser warranted that,

...during his occupancy of the dwelling the  
septic tank system has operated  
satisfactorily and to the best of his  
knowledge the system was installed  
according to the provisions of the Health  
authorities having jurisdiction.

It, therefore, was clearly an item which was addressed and contained in a warranty given by the vendor in the MacLeans' purchase.

Evidence was given that at no time during the previous two years had there been any claim raised by the original purchasers with respect to a defect in the septic tank system. Evidence was given that a flower bed had been developed at the front of the house over the septic tank system although there was some diversity of opinion as to whether the flower bed had been constructed on top of the sod or whether sod had been removed. Evidence was given that if, in fact, the bed had been developed with sod removed, there would have been a potential for additional water to accumulate in the system and cause the overflow of which the MacLeans are complaining.

There is also evidence that trees had been planted along the driveway, although not on the septic tank drainage lines. There was further evidence given through photographs of some subsidence of land over the drainage system which may have been caused by a truck or trucks crossing the front lawn where the drainage system was located. Unfortunately, there was no evidence with respect to these matters as these were all in existence prior to the completion of the purchase by Mr. and Mrs. MacLean.

There was also some question raised as to the adequacy of the soil cover over the drainage bed, but the evidence of the representative from the Health department was to the effect that the coverage was adequate.

The Tribunal was, therefore, faced with the fact that while it is possible that there may have been some problem with the septic tank drainage system which had a cumulative effect which only manifested itself subsequent to the MacLean's purchase, there is also the equal possibility that the presence of the flower bed, the planting of the trees and the possible presence of a truck which created the ruts in the front lawn might be of equal causation for the problem which now occurs several months in each year.

The problem facing the Tribunal is, therefore, that in the absence of a clear causal effect, the onus incumbent upon the claimants to prove that there was a defect in workmanship or material in the septic tank system has not been met and the Tribunal cannot in the absence of such evidence of causation grant the claimants' application.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Warranty Program to disallow the claim.



BRUCE AND JANET MANDELL

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman presiding  
GORDON R. DRYDEN, Vice-Chairman as Member  
D.H. MACFARLANE, Member

APPEARANCES: MAX SHAFIR, representing the Applicants

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF HEARING: 18, 19, 20, 21 September 1990 Toronto

REASONS FOR DECISION AND ORDER

This is a claim before the Commercial Registration Appeal Tribunal in respect to breach of Warranty regarding the construction of a home at 28 Valoncliffe Road in the Town of Markham.

Whether the home is covered under the Warranty which is provided in Section 13 of the Act is dependent upon determining if 597759 Ontario Ltd., carrying on business as Advanced Carpentry and/or Herman Vander Schaaf are builders as defined in Section 1 of the Act or are a "vendor", also defined under Section 1 of the Act.

Much was made in presentation to the Tribunal of the distinction as to whether the contracting party was a "builder" or a "project manager", the former being a vendor for the purposes of the Warranty under the Act and the latter not so being.

In order to make this determination, the Tribunal had to consider not only the facts concerning the construction of this particular home, but also the contract between the Mandells and 597759 Ontario Ltd. and Herman Vander Schaaf.

In considering the facts of this particular case, it would appear that Mr. and Mrs. Mandell acquired the property upon

which an existing house was located some several years prior to the events leading up to the new construction. While it appears that Mr. Mandell was peripherally involved, the prime contracting party in all of the events was Mrs. Mandell.

When it came time to consider constructing a new home on the site, Mrs. Mandell engaged the architect, hired consultants to deal with heating and acoustics and was the prime mover in approving the architectural plans as prepared. It was Mrs. Mandell who attended at the municipality and obtained the Building Permit.

Subsequently, it was Mrs. Mandell who, on the evidence of a number of witnesses, became very knowledgeable about the construction in the area of materials and design. In the words of the representative of Mother Hubbards Kitchen, Mrs. Mandell was "well researched". Mrs. Mandell, together with her cousin, Mrs. Ash embarked on extensive trips of exploration to determine among other things brick work, and this led them to the premises under construction at 17 Tudor Gate.

At Tudor Gate, Mrs. Mandell met with Herman Vander Schaaf who was managing the completion of the project for the owner, Mr. Daniels, with whom Mrs. Mandell also conferred. Mrs. Mandell attended at 17 Tudor Gate on a number of occasions and showed the plans prepared by her architect to Mr. Vander Schaaf and asked him to give her an estimate of cost. She received from Mr. Vander Schaaf, in due course, such an estimate, together with a draft agreement the format of which apparently had been produced by Mr. Daniel's lawyers and had been used by Mr. Vander Schaaf in the completion of the work at 17 Tudor Gate.

This agreement, together with the estimate, was taken by Mrs. Mandell to her solicitor who made revisions to the agreement and returned it to the Mandells. The solicitor had no involvement in any further negotiations and there was no reference in the agreement to compliance with the provisions of the New Home Warranties Plan Act. The agreement, as filed with the Tribunal, was executed by Mr. and Mrs. Mandell and by Herman Vander Schaaf, but not by 597759 Ontario Ltd.

Subsequently, Mrs. Mandell applied to the Committee of Adjustments, obtained a Demolition Permit for the old house on the site, provided an advance of funds to the numbered company and made arrangements to pay to the numbered company twice monthly based on the amount of work being done as evidenced by invoices, plus an amount characterized by Mrs. Mandell as the contractor's profit. Evidence was presented to the Tribunal that Mrs. Mandell was present on a frequent basis during the course of construction.

Further evidence indicated that Mrs. Mandell sought out and made the determination that the kitchen and bathroom cupboards were to be provided by Mother Hubbard's Kitchen and that she introduced Mr. Vander Schaaf to that company. It was Mrs. Mandell who made all of the decisions with respect to the cupboards, but then informed the supplier that the contract should be with the numbered company. The witness for Mother Hubbard's Kitchen stated that this was a somewhat unusual procedure, but that she was prepared to accept the instructions of Mrs. Mandell in this regard.

Evidence was also given that the security and vacuum system supplier and installer was introduced to Mr. Vander Schaaf by Mrs. Mandell and again, arrangements were made that the invoicing was to be to the numbered company.

The Tribunal was informed that a number of design modifications occurred during the course of construction and that in all cases Mrs. Mandell played a significant role in decisions with respect to such modifications. Among these changes were the following: the post in the basement area was relocated and Mrs. Mandell indicated in her evidence that this was a matter which she had from the outset wanted to have changed; changes were made in the roof design of the garage; changes were made in Mrs. Mandell's mother's room, in the master bathroom and in the bathroom adjacent to her exercise area; changes were made in the house roof design and changes were made in the windows in the living room.

With the exception of the change in the windows in the living room, Mrs. Mandell indicated that none of these modifications were made with advice of her architect. Subsequently, because of objections raised by the Municipality, the architect did prepare drawings for the house on an 'as built basis' which were submitted to the town of Markham for Building Permit modification approval.

Throughout the project, Mrs. Mandell assumed other responsibilities, such as applying to the Committee of Adjustments for approval to build an indoor swimming pool, which was subsequently rejected.

Throughout the project, on the evidence presented to the Tribunal it appears that Mrs. Mandell was constantly on the site conferring with Mr. Vander Schaaf. Furthermore, she and Mrs. Ash were involved in the processing of the payments to the numbered company on a twice a month basis based upon the information provided to Mrs. Mandell and Mrs. Ash by Mr. Vander Schaaf as to the work required to be paid for, or deposits to be made on contracts to be entered into, and provision for his profit.

It appears, therefore, that in the course of the construction of the house at 26 Valoncliffe Court, there were a number of contracts being entered into. Some of these Mrs. Mandell was intimately connected with; others, on her evidence, she relied upon Mr. Vander Schaaf to arrange.

By December, 1989 Mrs. Ash and Mrs. Mandell became concerned as to the rate of development of the construction and what appeared to be cost overruns. Mr. Vander Schaaf was confronted with these and terminated his involvement with the project at that time, leaving the house substantially incomplete.

The Program has acknowledged that substantial damages have been incurred by the Mandells, but maintains that the numbered company is not a vendor under the provisions of the Ontario New Home Warranties Plan Act and, therefore, the Program is not required to provide the Warranty contained in Section 13 of the Act.

In determining whether the numbered company or Mr. Vander Schaaf is a vendor, the Tribunal has had to determine whether in fact the numbered company or Mr. Vander Schaaf is a "builder" under the Act. Section 1(a) of the Act defines a builder as being:

A person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home...under a contract with a vendor or owner.

Under clause (n) of Section 1, the term vendor "includes a builder who constructs a home under a contract with the owner". It is, therefore, necessary for the Tribunal to consider carefully the contract between the numbered company and Mr. Vander Schaaf and Mr. and Mrs. Mandell to determine whether the numbered company or Mr. Vander Schaaf is a builder under the definition of the Act.

A number of the professional witnesses before the Tribunal indicated that the difference between a builder and a project manager is often rather indistinct. Essentially their evidence related to the degree of control asserted over the project. If prime control was that of the contractor, then such contractor was the builder. If prime control was elsewhere, then the contractor was a project manager. From the facts of this case, because of the intense involvement of Mrs. Mandell and the financial control asserted by Mrs. Ash in conjunction with Mrs. Mandell and, in particular, the direct involvement in the modifications by Mrs. Mandell, there is a clouding of who might very well be in control of the project.



Therefore, the Tribunal has an obligation to look very carefully and analytically at the contract dated April 17, 1989 between the Mandells described as the owners, 597759 Ontario Ltd. carrying on business as Advanced Carpentry defined as the contractor, and Herman Vander Schaaf defined as the guarantor; and to determine whether this is a contract whereby the contractor undertakes the performance of all the work and supply of all the materials necessary to construct a completed home.

In examining the agreement, the Tribunal must consider all of the circumstances surrounding the preparation and completion of such agreement. The uncontradicted evidence of Janet Mandell was that the initial draft agreement was prepared by Herman Vander Schaaf who is a carpenter by trade. Having observed him in the witness box, it is evident to the Tribunal that he lacked the ability to draft such an agreement or to fully comprehend it.

The Mandells on the other hand are quite sophisticated, highly talented and knowledgeable real estate agents, who turned the agreement over to an experienced commercial and real estate solicitor. It was his modifications of the agreement, together with consultation with the Mandells, which resulted in the final executed agreement which was presented as an exhibit to the Tribunal.

In the evidence of Mrs. Mandell there was expressed a degree of urgency as Mrs. Mandell wanted to have Vander Schaaf involved in the construction of her home, and there was a possibility that he might take on other jobs if speedy arrangements were not made. While a number of changes were made by the Mandells and their solicitor in the original draft produced by Herman Vander Schaaf, there were no changes inserted by Vander Schaaf in the final agreement.

The agreement, therefore, is principally that of the Mandells and if there is any ambiguity in the agreement it must be interpreted in favour of the contractor and guarantor and against the Mandells.

In examining the agreement, it is noted that the agreement is executed by the Mandells and by Herman Vander Schaaf, who was described in the preamble to the agreement as the guarantor. The witness to all of these signatures is the same individual. The agreement is not specifically executed by 597759 Ontario Ltd. carrying on business as Advanced Carpentry. Nevertheless, in the view of the Tribunal, 597759 Ontario Ltd. is in fact a party to the contract operating through its agent, Herman Vander Schaaf and through the evidence presented by the various



witnesses of contracts entered into relating to this construction, including performance of the contract by the numbered company through its being invoiced by suppliers and by its invoicing Mrs. Mandell.

In considering the contract, it is important to note the identity of the various parties. Mr. and Mrs. Mandell are designated the "owner", the numbered company is designated "contractor", and Mr. Vander Schaaf is designated "guarantor".

The opening recitals of the agreement provide as follows:

- "1) As the Owner wishes to construct a new residence at 28 Valoncliffe Road in the Town of Markham;
- 2) And as the Contractor wishes to oversee, direct and provide consulting services with respect to such construction;
- 3) And as the Owner has agreed to pay and the Contractor has agreed to accept a 15% fee as full consideration of such overseeing, direction and consultation,
- 4) And as the construction to be completed requires the engagement of Sub-Contractors and the purchase of construction and other materials." (emphasis added)

It is to be noted that in the preambles, therefore, there is no indication that the numbered company or Herman Vander Schaaf is to be engaged to construct a completed home. In fact, the recitals indicate that it is the Mandells as owner who will construct the completed home with the contractor overseeing, directing and providing consulting services. If such opening preamble is carried through in the operative sections of the agreement, the hiring of the contractor would be the hiring of a project manager and not that of a builder.

In the view of the Tribunal, however, the preamble is only an expression of intent and may be used for the purposes of explaining wording which may subsequently seem unclear, but in fact, the contractual wording of the agreement will govern.

Section 1 of the agreement is headed "Engagement". The wording of paragraph 1.1 provides "the owner hereby engages the contractor to supervise, direct and consult with respect to the construction". On page 2 of the agreement, the contractor accepts

the engagement and agrees that Mr. Vander Schaaf, as representative of the contractor, will be present on the site at least four hours on all days except Saturday, Sunday and Holidays.

There then proceeded to be enumerated eighteen specific services to be provided by the contractor. Before specifically enumerating these, it is provided that the contractor shall provide "all services reasonably required by the Owner for any phase of the completion of the construction". It is to be noted from the wording of this general provision that the Owner, by the contract, is to be in control of the construction and to make the determination of what services are to be provided by the contractor. There then follow the specifics. It is important to note these items:

- " (i) Consulting with the owner with respect to the house.
- (ii) Advising on the contractor's selection of sub-contractors for the construction, whose final selection shall be approved by the owners. In each area of the construction, the contractor shall provide at least three competitive quotes.
- (iii) Choosing and examining construction and other materials to be used in the construction.
- (iv) Ensuring that all construction and other materials used in the house are of a first-class premium standard and are of good merchantable quality, fit for their intended purpose and in accordance with the plans and specifications for the house, as instructed to date by the owners and during the course of construction.
- (v) Advising with respect to general practices in the construction industry and with respect to fair compensation for sub-contractors, services and materials.
- (vi) Ensuring that the house construction proceeds in accordance

with the plans and specifications as instructed by the owners.

- (vii) Ensuring that the house construction is begun on the commencement date, proceeds on schedule and is completed within the time allowed and no later than the completion date.
- (viii) Ensuring that the house construction is completed within and in accordance with the budget. Any increases in the budget or any extras shall be first approved in writing by the owners.
- (ix) Ensuring that the house construction proceeds and is completed in a first-class professional manner to the satisfaction of the owner.
- (x) With respect to the construction, giving the required notices and complying with the laws, ordinances, rules, regulations, codes and orders of the authorities having jurisdiction.
- (xi) Verifying that the house construction and the plans and specifications for the house construction are in compliance with the applicable laws, building code, ordinances, rules, regulations and codes relating to the house construction including without limiting the generality of the foregoing, applicable provincial standards, and CMHC building standards, where applicable.
- (xii) Preparing and updating a schedule for the commencement, implementation and completion of the project.
- (xiii) Ensuring that materials used in the project are new and of a first-

class premium standard best suited to the purpose required.

- (xiv) Maintaining good order and discipline at the project location.
- (xv) Ensuring that sufficient and skilled manpower are utilized for the project.
- (xvi) Ensuring that the project proceeds without damage to the project location or adjacent properties.
- (xvii) Maintaining the construction site in a tidy condition and free from the accumulation of waste projects and debris.
- (xviii) Ensuring that all sub-contractors will guarantee their workmanship and materials for one year from the date of completion of the contract. "

It should be noted that none of the services specifically require the contractor to construct a completed home for the owner. Clause (i) requires the contractor to consult with the owner; clause (ii) provides that the contractor will advise the owner, but that the owner will have the final selection with respect to the engaging of sub-contractors.

Clause (iv) requires the contractor to inspect the quality of the materials going into the construction; clause (v) requires the contractor to advise with respect to general practices in the construction industry. Clause (vi) imposes an obligation on the contractor to see that the house construction proceeds in accordance with the plans and specification "as instructed by the owners". Clause (vii) requires the contractor to see that matters proceed on a timely basis; and clause (viii) that matters are proceeded in accordance with the budget, obtaining approval for extras in writing from the owners.

Clause (xi) requires the contractor to verify that construction is in compliance with applicable laws. The balance of the clauses, with the exception of clause (xviii) deal with general supervision of the construction.

Clause (xviii) is a curious clause in that it provides that the contractor will ensure that sub-contractors will guarantee their workmanship and materials for one year from the date of completion of the contract. In order to have meaning, this must contemplate a direct guarantee from the sub-contractors to the owners which would be consistent with there being a direct legal relationship between the owner and the sub-contractors.

Clause (b) of the section identifies a standard as being that of 17 Tudor Gate which Mrs. Mandell stated was inserted by her solicitor.

It is to be noted that nowhere in this article 1 is it provided specifically that the contractor shall build or construct the home for the owner. In fact, the services to be provided by the contractor are consistent with those which would be provided by a project manager operating under the direction of a builder. The Tribunal notes for example the use of words such as "consulting", "advising", "ensuring" and "verifying" which would indicate work being performed by other parties than the numbered company or Vander Schaaf.

In dealing with Section 2.1 relating to fees, it is provided that the owner will give to the contractor an advance of \$75,000 to be applied toward payment of initial invoices, and thereafter payments are to be made to the contractor, but based upon invoices submitted by the contractor to the owner relating to work performed by either the contractor or sub-contractors. In addition, there is to be paid a 15% fee on the "contractor's cost for the contractors supervision".

It is to be noted that the fee is a supervision fee and while the wording is termed "contractor's costs", it clearly has relationship to the \$790,000.00 proposed budgetary costs set out in the schedule attached to the agreement. The mere terminology of the wording as "contractor's cost" does not necessarily mean that it is the contractor's costs of construction or that the contract is a "cost plus" building contract. In fact, the evidence clearly indicated that Mrs. Ash was reviewing the items based upon invoices submitted by the various trades. Again, this arrangement, permitting Mrs. Ash and Mrs. Mandell to scrutinize such bills would lead to an assessment that this is more of a managerial contract than a construction contract.

Section 3 of the agreement attempts to define the legal relationships of the parties and third parties. In essence, the agreement provides that no third party can, as such, obtain any benefits under this specific agreement; that the owner and the contractor are operating independently. The section goes on to



provide that the contractor will be responsible for acts and omissions of sub-contractors, damages suffered by reason of acts of sub-contractors and payments to sub-contractors. While these are onerous obligations imposed by the owner upon the contractor, they of themselves do not necessarily mean that the contractor is a builder. Had the contractor been more knowledgeable of legal phrases or had he obtained independent legal advice, these clauses might very well have been modified or deleted.

Section 5 dealing with the warranty has to be considered with the other portions of the contract which require the contractor to obtain three bids. Only when the three bids had been obtained was the owner to determine which contractor would be used. Under the agreement, only then would the contractor enter into the agreement and it, therefore, is not inconsistent with the provisions of the agreement that the warranty of the sub-contractor would be assigned to the owner.

Section 6 of the agreement deals with insurance and indemnification. While it is provided that the contractor is to indemnify and hold harmless the owner, this can only apply if the Mandells are liable at law and are, in fact, the occupiers of the property at the time. In that capacity, they may very well be considered to be the "builder" who is in control of the property and the construction thereon.

In examining Section 7.1 of the agreement, it is noted that the owners have the right to approve all contracts for the purchase of building materials, fixtures, colours and any other contract. It should be noted that control by this clause continues to remain with the owner.

In paragraph 7.3, the contract refers to the estimated cost for completing the proposed lands and premises and there is a bonus provision provided the costs plus supervision fee are less than the \$948,000. Again, this wording suggests that the contractor is managing the project rather than undertaking the performance of all the work and the supply of all the materials necessary to construct a completed home.

While paragraph 8.2 provides that this is the entire agreement, the evidence clearly indicates that there were many other contracts between the contractor and the owner. These included provisions for changing the house roof design and the construction of a pool.

In considering paragraph 10.1, which provides prior to completion of the contract for inspection this section requires the contractor to make sure that the construction has been

completed and that deficiencies noted by the owner are to be rectified by the contractor. How they are to be rectified, whether by the contractor, sub-trades or others is not specified. In the view of this Tribunal this is not totally inconsistent with the obligations of a Manager of the project.

Not one reference in the agreement is made to compliance with the provisions of the Ontario New Home Warranties Plan Act, or a representation that the contractor is registered as a builder under that Act. In the view of the Tribunal, this is a glaring oversight when one considers that the Mandells are very experienced in real estate and, in fact, engaged a solicitor who is also experienced in real estate. It suggests that neither the Mandells or their solicitor considered the numbered company or Vander Schaaf a "builder" as defined in the Act.

On the basis, therefore, of all the evidence which was presented to the Tribunal and the examination in detail of the agreement of April 17, 1989, even discounting almost entirely the evidence of Mr. Vander Schaaf, the Tribunal is of the view that the essential nature of the agreement of April 17, 1989 was the engagement of the numbered company and Mr. Vander Schaaf as a project manager. Mrs. Mandell did not relinquish control over the construction and, therefore, 597759 Ontario Ltd. is not a builder as defined under the Act, and cannot therefore be a vendor as defined under the Act, and the warranty provided under Section 13 of the Act is not applicable to the construction of this home.

While the Tribunal has found on the facts that 597759 Ontario Ltd. carrying on business as Advance Carpentry is not a builder, the Tribunal is satisfied on the basis of the cases cited to it that such finding is consistent with those decisions. In the case of Ronald Bond (1988) CRAT Volume 17 p.94, the Applicant Bond himself obtained the Permit and contracted for various aspects of the construction. In the present case, Mrs. Mandell obtained the Building Permit and was instrumental in at least some of the contracts such as that for the security and vacuum system and the Mother Hubbard Kitchen contract even though on her direction these contracts were to be signed by the numbered company. The evidence clearly indicated as well a direct and continuing involvement. In Mrs. Mandell's own evidence, she indicated that one of the reasons that she wanted someone like Herman Vander Schaaf to be involved was that he would devote a substantial number of hours every day to the project. Her evidence that she spent a considerable amount of time on the project site with Herman Vander Schaaf indicated a continuing involvement in the project and no relinquishing of the control over it. Similarly in the Raymond McDiarmid case (1988) 17 CRAT 148, McDiarmid maintained a major control over the construction.

In addition, he took out the Building Permit in his name.

In neither of these cases was there reliance placed on the Ontario New Home Warranty Program or enquiry as to whether the contractor was registered as a builder under that Program and both Bond and McDiarmid were held to be the "builder" and the construction not covered by the Program's warranty. These facts are similiar to the instant case.

In the Larry Morton case reported at (1988) 17 CRAT p.159, the circumstances were quite different. There full representations were made that the builder was registered under the Program and the contract contemplated a complete construction with only certain items being provided to the builder for use by the builder in completing the construction. Similarly in the Leon Kozeriok case, substantial reliance was placed upon the fact that the builder was a registered builder and an enrollment fee was paid to the Program. Such is not the situation in the current case and as indicated in these reasons, the Tribunal is of the view that the Mandells and their solicitor should clearly have contemplated this aspect if they considered the numbered company to be a builder for whose actions they would be indemnified by the Program. Under the circumstances, these latter cases referred to the Tribunal do not assist the Applicant here.

Therefore, pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claim of Bruce and Janet Mandell under the Act.

CAMERON METCALFE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member  
LOUIS A. RICE, Member

APPEARANCES:

CAMERON METCALFE, appearing on his own behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 8, 18 May 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered December 1, 1989, disallowing all claims of Mr. Metcalfe arising from the purchase of his home from the builder, 726441 Ontario Ltd. The claims are based on Section 13(1) of the Ontario New Home Warranties Plan Act.

Mr. Metcalfe testified that prior to buying the home, he was in the business of buying homes, fixing them up and then reselling them for a profit. Because of a heart attack, he had to give up this business.

In November 1988, he accompanied his parents to the builder, also known as Alton Village Estates, to give them advice on buying a home. The homes in the subdivision visited were in various states of completion. His parents purchased a home on Lot 72 and Mr. Metcalfe decided to buy the house located on Lot 73. The home was purchased solely to be lived in. As appears from the Contract of Purchase, the purchase price therein stipulated was \$156,000. Mr. Metcalfe testified that the total purchase price was \$164,000 of which \$8,000 was for services he was to render on the site.

As appears in Exhibit 7, he was to provide 400 hours of services at \$20.00 an hour supervising the completion of homes throughout the subdivision, including his own.



Mr. Metcalfe stated that at the time of purchase, his house was bricked and drywalled, but not yet painted. It had no doors, fixtures, or rugs. The builder undertook to complete the home, with a closing fixed for January 1989. It ended up taking place April 1, 1989.

In Exhibit 8, D.R. Hunter, previously Vice-President of the builder, declared that the home was to be delivered in a fully completed state; that is, that Mr. Metcalfe was not taking the house "as is".

Metcalfe testified that the builder never finished his home because, upon losing its financing in May of 1989, it abandoned the site. Mr. Metcalfe had taken possession and moved into the home in April 1989. No Certificate of Completion and Possession was prepared by the builder and Mr. Metcalfe states that he himself was unaware of such a document being required.

He did, however, produce as Exhibit 9, an Order to Comply by the Corporation of the Town of Caledon listing numerous deficiencies to be remedied. It was agreed by all parties to these proceedings that to the extent that it related to the specific items of deficiencies reported to the New Home Warranty Program, the Order to Comply would be treated as a Certificate of Completion and Possession. That is, the Order to Comply would prove that a deficiency existed at the time Mr. Metcalfe took possession of his home.

Mr. Metcalfe said that he fixed some of the deficiencies upon taking occupancy of the home. He first spoke to the New Home Warranty Program September 14, 1989 when a representative was on the site with respect to another complaint. He was advised to file a list of deficiencies and did so. (Exhibit 4)

A representative from the New Home Warranty Program came to visit the home November 1, 1989 and then prepared a Conciliation Report filed as Exhibit 5.

As appears from the report, the New Home Warranty Program at first agreed to cover ten items in Section "A(1)" of the Report. All other claims were rejected in Section "A(2)" of the Report.

Later, the New Home Warranty Program also refused to cover the items in "A(1)" claiming that Mr. Metcalfe had accepted the home in an "as is condition" and had specifically undertaken to assume responsibility for correcting any deficiencies at his own expense.



Mr. Metcalfe agreed to drop the following claims appearing in Section "A(2)" of the Report: Items 5, 6, 7, 8, 13, 14, and 15a, d, f, g, and j.

We shall examine each item remaining on the list of complaints in the Conciliation Report after reviewing the testimony with respect to the general matters at issue.

In cross-examination, Mr. Metcalfe stated that he had received an additional \$1,500 from the builder for work beyond 400 hours which he had provided, as well as \$500 worth of fixtures.

He moved into the home despite the problems he faced because he needed a home to live in. He knew many other homes had to be fixed and that his would also eventually be repaired. He testified categorically that he had never taken the house "as is" because he had paid full price for the house. He further stated that even though the contract of purchase contains clauses dealing with the Certificate of Completion and Possession, he did not bother reading the clauses.

He stated that he received two skylights in his home as payment for doing extra work and also received improved bay windows for a value of \$200 which represented ten hours of work.

He states that he did not know that the floor had different requirements for installing tiles rather than linoleum.

In defence, the first witness Jim Fortune, conciliator with the New Home Warranty Program, testified that he had visited Mr. Metcalfe's home and drafted the Conciliation Report, Exhibit 5. He testified that at a meeting with Mr. Metcalfe, he was never told about work which Mr. Metcalfe had done on his own home, about the \$8,000 in fees which he received for 400 hours of work, or about the installation of tiles.

Mr. Fortune said that he had a meeting with David Hunter, a principal of the builder, and had access to his files. He drafted a memorandum to file giving an account of his conversation with Mr. Hunter which was produced as Exhibit 15. Mr. Fortune states that he understood from the conversation with Mr. Hunter that Mr. Metcalfe undertook to complete his own home at his expense.

Mr. Hunter stated that the New Home Warranty Program has had complaints with respect to 25 to 28 of the 52 homes for which the builder was responsible. The builder never attended meetings dealing with the deficiencies, nor showed any cooperation or compliance. The Program has accepted responsibility for remedying

deficiencies in the case of other owners. It refused to do so for Mr. Metcalfe because it considered that he had assumed responsibility for repairing the deficiencies in his home or was himself responsible for deficiencies complained of.

In cross-examination, Mr. Fortune testified that there was no documentation indicating that Mr. Metcalfe took the house "as is".

Mr. Wheaton, Manager of the Brampton Regional New Home Warranty Program office, testified that he never visited Mr. Metcalfe's home. He stated that he was present at a meeting with Mr. Fortune and Mr. Metcalfe which took place on January 25, 1990 at his office. He took notes on the discussion and drafted a memo introduced as Exhibit 16.

He stated that it was through Mr. Hunter that the Program first learned of the 400-hour work contract, although the Program did know that Mr. Metcalfe had worked for the builder. He believed that when Mr. Metcalfe supervised work on his own home under that agreement, he was automatically disqualified from claims regarding such work from the New Home Warranty Program.

He felt that since Mr. Metcalfe supervised work on other homes, his failure to complete the work on his own home, could only be explained by presuming that he had assumed personal responsibility for such repair of deficiencies. It should be noted that in the testimony of Mr. Metcalfe, he stated that he purposely deferred repairing some of his own problems because other homeowners required more urgent repairs.

Mr. Wheaton stated that the New Home Warranty Program now agreed to cover Items "A(1)"3 and "A(1)"6 of the Conciliation Report.

The final witness was Mr. David Hunter, a business consultant. He testified that he was Vice-President and did accounting work, but had no shares in the construction company. That Company, the builder, is now insolvent and abandoned the work site in mid-May 1989. It did so without completing most of the homes in the subdivision.

Mr. Hunter testified that Mr. Metcalfe was hired to work on the site, and that he had drafted the letter of engagement, Exhibit 7, which Mr. Metcalfe had then signed. The work provided was valued at \$8,000 and reduced the purchase price of \$164,000 to \$156,000.

He stated that Mr. Metcalfe worked with the general supervisor, Mr. Wheeler, in finishing the various homes on the project so that possession could be given to the future owners. He was subordinate to Mr. Wheeler in his functions. He testified that the Metcalfe home was not sold on an "as is" basis.

He said that Mr. Metcalfe complained on occasion to him that there was work still to be done on his own home. In response, he told Mr. Metcalfe it was his and Mr. Wheeler's responsibility to see that it was done.

Mr. Hunter stated that the company still owes \$750,000 and has no assets. He believes the company is still responsible to complete deficiencies in Mr. Metcalfe's home, but does not know how it can do so without funds. He does not believe, however, that the builder is responsible for the floor because this was to be done by Mr. Metcalfe. The builder should be responsible for the deficiencies in the skylight because it provided it, as well as its installation.

Finally, Mr. Hunter said that he did certain tax work for Mr. and Mrs. Metcalfe.

In cross-examination, Mr. Hunter stated categorically that Mr. Metcalfe did not buy the home on an "as is" basis and that when any work was done on his home, Mr. Metcalfe was acting on behalf of the company in executing such work. He never personally saw Mr. Metcalfe do any work on skylights, bow windows and clothing closets.

The Tribunal believes that on the basis of the testimony heard and documentation produced, Mr. Metcalfe did not buy his home on an "as is" basis. He is, therefore, entitled to all the warranties provided by the Act and Regulations.

We shall now examine each item of claim which remains outstanding to decide whether it is warrantable under the New Home Warranties Plan Act:

Item 1 - Caulking (Exhibit 5, Schedule "A(1))

All parties agree that the exterior of the Metcalfe home was not completely caulked in the areas of the window and door openings. There is a gap between the side of the brick moulding and the brick veneer or vinyl siding.

The New Home Warranty Program claims that this item should not be covered because they believe that Metcalfe agreed to assume responsibility for the caulking. The Program recognizes that the contract would include caulking unless Metcalfe personally assumed responsibility.

The Tribunal finds that there is no proof of any sort indicating that Mr. Metcalfe undertook to do the caulking at his own expense. All evidence would indicate the contrary. For this reason, the Tribunal directs the New Home Warranty Program to perform the repairs necessary to correct the problem with the caulking.

Item 2 - Flashing (Exhibit 5, Schedule "A(1)")

Mr. Metcalfe complained that flashing at brick at siding around the house was incomplete. The New Home Warranty Program in the Conciliation Report (Exhibit 5) observed that the aluminum flashing that was installed between the vinyl siding and the brick veneer was not completed in a workmanlike manner. As a result, water cannot drip off at certain locations.

The New Home Warranty Program recognizes that this was a common complaint in the entire subdivision and that the Program warranted this problem on the other homes.

Since the Tribunal has found that Mr. Metcalfe did not accept the home in an "as is" condition, he should also benefit from the warranty.

The Tribunal, therefore, directs the New Home Warranty Program to proceed to the repairs of this problem.

Item 3 - Laundry Pump (Exhibit 5, Schedule "A(1)")

The New Home Warranty Program has agreed to warrant this item and the Tribunal, therefore, directs the New Home Warranty Program to remedy the problem.

Item 4 - Front Door Jambs (Exhibit 5, Schedule "A(1)")

Mr. Metcalfe complains that the door jamb of the front exterior door was damaged. He failed, however, to produce any evidence to prove that it was damaged before he took possession of the home; it does not appear on the Order to Comply.

The Tribunal holds that Mr. Metcalfe has failed to prove his claim. He is, therefore, not entitled to any warranty.

Item 5 - Receptacle in the Family Room (Exhibit 5, Schedule "A(1)")

Mr. Metcalfe has complained that the receptacle in the family room does not work, that the duplex outlet does not have any power.

It is in evidence that Mr. Metcalfe did certain work in this area when working on the heating duct which was just above the receptacle wiring. While there is no evidence that he disconnected the wire, Mr. Metcalfe failed to prove that the wire had been cut prior to his taking possession of the home. As a result, the Tribunal rejects his claim with respect to this item.

Item 6 - Sag over garage door and header (Exhibit 5, Schedule "A(1)")

The New Home Warranty Program has agreed to cover this claim and is, therefore, directed to do so.

Item 7 - Furnace cap bent (Exhibit 5, Schedule "A(1)")

It is in proof that the rain cap of the B-Vent chimney is damaged. The New Home Warranty Program argued that if Mr. Metcalfe took the home "as is", this item would not be covered. Since the Tribunal has found that Mr. Metcalfe did not take the home "as is", it directs the New Home Warranty Program to proceed to repair or replace this item under the warranty.

Item 8 - Wall in spare room by cupboard not acceptable (Exhibit 5, Schedule "A(1)")

In the northeast bedroom, the builder erected a bulk head to enclose the B-vent chimney. The drywall of this bulk head was not completed in an acceptable manner as there was one stud not in line with the others in the bulk head.

The New Home Warranty Program agrees that this item would be warranted unless the home was bought "as is". On this basis, the Tribunal directs the New Home Warranty Program to warrant the item and proceed to repair the bulk head.



Item 9 - Skylights not installed properly (Exhibit 5, Schedule "A(1)")

The New Home Warranty Program observed that in the master bedroom, the trim around the skylight was incomplete; as a result, the insulation installed at this location was still exposed to the room.

The New Home Warranty Program argued that since this item did not form part of the original contract, it should not be covered.

The Tribunal finds that the builder undertook to provide this item under a supplementary oral construction contract and it is, therefore, subject to warranty. As a result, the Tribunal directs the New Home Warranty Program to complete the trim around the skylight.

Item 10 - Bow in dinette floor excessive (Exhibit 5, Schedule "A(1)")

The New Home Warranty Program observed that there was a downwards deflection of the ceramic tiled floor in the dinette which occurred in front of the patio doors. Mr. Metcalfe testified that he, himself, laid the tile which caused the problem.

The Tribunal finds that Mr. Metcalfe is not entitled to be warranted for this item. Section 13(2)(a) of the Act holds that a warranty does not apply in respect of defects in workmanship supplied by the owner.

Item 1 - Siding at garage roof on house (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe complained that the siding at the garage roof of the house wall was not acceptable. The New Home Warranty Program found that the vinyl siding appeared to be installed in a normal manner, where the garage roof meets the side of the home. Mr. Metcalfe did not present any evidence of any problem with the siding.

The Tribunal, therefore, rejects Mr. Metcalfe's claim because no proof was made of a specific problem.

Item 2 - Laundry vent and heating ducts incomplete (Exhibit 5, Schedule "A(2)")

The New Home Warranty Program observed that the run of heating duct, located above the dryer in the basement of the home, had been cut in order to allow the installation of the dryer vent exhaust to the exterior of the home.

Mr. Metcalfe admits that he made this change in order to accommodate the installation of the laundry vent in the header of the floor joists.

Mr. Metcalfe testified that he had to make this cut because of the poor workmanship of the builder.

The Tribunal finds that, on the evidence, the problem was not caused by the work carried out by Mr. Metcalfe.

The Tribunal, therefore, directs the New Home Warranty Program to reconnect the heating vent or revert the dryer, as it chooses, in order to solve the problem.

Item 3 - Front door dented and stains in carpets (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that he first noticed the dents in the door in November 1989, long after he took possession of the home. He noticed the stains in the rugs after taking possession. These items did not appear in the Order to Comply.

The Tribunal rejects this claim because Mr. Metcalfe failed to prove the problems existed at the time possession was taken.

Item 4 - Magnetic strip missing on front door (Exhibit 5, Schedule "A(2)")

This item is refused because it is included in Item 4 of Schedule "A(1)" which has been refused.

Item 9 - Windows downstairs stick (Exhibit 5, Schedule "A(2)")

The New Home Warranty Program observed that there was a number of windows in the home that did not slide up and down properly.

Mr. Metcalfe admitted that he had painted the outside windows with primer, but that the builder had carried out the painting on the inside of the windows and had also installed them. He stated that the windows were stuck before he put on the primer.

The New Home Warranty Program refused the claim saying it was the primer that was the cause of the problem.

The Tribunal finds that, on the evidence, the primer is the least likely reason for the existence of the problem which, in any event, already existed before the primer was applied. The Tribunal, therefore, directs the New Home Warranty Program to repair the windows.

Item 10 - Rain leader extensions not on (Exhibit 5, Schedule "A(2)")

The New Home Warranty Program observed that there were no rain water leaders installed on the elbows at the bottom of the downspouts from the eavestrough on the home.

Mr. Metcalfe said that all other homes received rain water leaders. The New Home Warranty Program refused the claim because there was no requirement in the Ontario Building Code for the installation of rain water leaders.

The Tribunal notes that there was no contractual obligation to provide such leaders and failure to do so is not a breach of the Ontario Building Code. As a result, the Tribunal rejects this claim by Mr. Metcalfe.

Item 11 - Basement leaks on north east side (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe complained about the leaks to the basement which, he claimed, resulted because of the window wells not being properly installed.

The New Home Warranty Program observed no problem in the installation of the window wells. Mr. Fortune observed that the window wells were full of debris when he visited the home indicating they were not being properly cleaned.

The Tribunal refuses this claim by Mr. Metcalfe because of insufficient proof of the window wells being improperly installed, together with Mr. Metcalfe's negligence in failing to keep the window wells free of debris.

Item 12 - Nail pops in walls in ceilings (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that nails pop out in the gyproc walls because of shrinkage or movement in the walls. There appears to have been only six nails which have popped out.

The New Home Warranty Program refused this complaint because the shrinkage was considered to be normal and, therefore, coverage was excluded under Section 13(2)(d) of the Ontario New Home Warranties Plan Act which declares that normal shrinkage of materials caused by drying after construction are not warranted.

The Tribunal rejects this claim because it is the result of normal shrinkage.

Item 15(b) - Flashing incomplete where garage roof intersects siding and brick on house (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that the flashing was not completed. The New Home Warranty Program refused the claim because it could not determine whether the homeowner was responsible for the problem because of work he was doing in the home.

There is no evidence that the homeowner was responsible for the problem and, as a result, the New Home Warranty Program is ordered to complete the flashing where the garage roof intersects the siding and brick of the home.

Item 15(c) - Flashing incomplete over windows of house (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that flashing was required to cover exposed insulation in windows. There is no evidence that he, in any way, was responsible for the problem. As a result, the New

Home Warranty Program is directed to complete the flashing over the windows of the house.

Item 15(e) - Drywall incomplete - holes (Exhibit 5, Schedule "A(2)")

Item 15(e) with respect to incomplete drywall under Schedule "A(2)" is refused because it falls under Item 11 of Schedule "A(2)" which was already refused.

Item 15(h) - Trim in hall, kitchen, bath, spare room incomplete - (Exhibit 5, Schedule "A(2)")

The New Home Warranty Program agrees that these items were incomplete.

The Tribunal directs the New Home Warranty Program to complete the trim in these areas since they constitute incomplete work under the construction contract.

Item 15(i) - Closet doors not installed in two bedrooms - (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that the builder failed to provide closet doors.

The Tribunal finds that the failure to provide closet doors constituted incomplete work under the building contract and, therefore, orders the New Home Warranty Program to see to the provision of the closet doors required in the two back bedrooms.

Item 15(k) - 3" high gaps in brick to windows - (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe complained that the gaps in the windows had to be filled in order to stop the wind from penetrating the home. The New Home Warranty Program believed that this problem might have been caused by the homeowner when he carried out certain work.

The Tribunal finds that there is no evidence to indicate that the homeowner is in any way responsible for the problem which is clearly one of bad workmanship by the builder. Under the circumstances, the Tribunal directs the New Home Warranty Program to fill the gaps in the windows in order to remedy the problem.



Item 15(l) - Exterior trim and window trim not painted together with door - (Exhibit 5, Schedule "A(2)")

The sole evidence was that of Mr. Metcalfe who testified that these items were never painted. The Tribunal finds that this constitutes incomplete work and directs New Home Warranty Program to proceed to the painting of the door and window trim, together with the door itself.

Item 15(m) - Door stop in sheets cupboard not painted - (Exhibit 5, Schedule "A(2)")

The proof was the same as that for the above item and, as a result, the Tribunal directs the New Home Warranty Program to paint the door stop in sheets cupboard.

Item 15(n) - Master cupboards, shelving and rods incomplete - (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that he received no shelving, although such shelving was provided in all the other homes in the project. He also failed to receive rods in the closets.

The Tribunal finds that this is an item which a homeowner would be entitled to receive in a closet in accordance with the customs of the trade. Under the circumstances, the Tribunal orders the New Home Warranty Program to install shelving and rods in the closet.

Item 16 - (Exhibit 5, Schedule "A(2)")

The owner complained that there was no quarter round between ceramic tile and kitchen cabinets and of certain other problems as detailed in Exhibit 5, Schedule "A(2)". Items a) and d) of the complaint are refused because Mr. Metcalfe did the work. Item b) with respect to the crack cover and lock assembly for casement windows in main floor powder room which was missing, as well as a missing transformer for the front door bell in Item d) are both granted by the Tribunal since they represent incomplete work under the contract. The New Home Warranty Program is, therefore, ordered to provide the crack cover and lock assembly for casement windows in main floor powder room, as well as a transformer for the front door bell.

Item 17 - Ceramic floor tiles on main floor cracked - (Exhibit 5, Schedule "A(2)")

Mr. Metcalfe testified that he, himself, installed the tiles on warped floors. These tiles ended up cracking. By his own testimony, the homes were only supposed to get linoleum tiling.

The New Home Warranty Program denied the claim because they found Mr. Metcalfe responsible for the problem.

The Tribunal denies Mr. Metcalfe's claim because he, himself, carried out the work and did so in a way which did not take into account, the fact of the floor being warped.

Item 18 - Doors in hall closet and powder room installed too high - (Exhibit 5, Schedule "A(2)")

The New Home Warranty Program found that the gap between the bottom of the doors and the floor were acceptable. Mr. Fortune actually measured the gap and found that it was 1" which was within the norms.

The Tribunal finds that the gap is acceptable on the basis of the proof presented and, therefore, refuses this claim.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program allow the claims with respect to Items 1, 2, 3, 6, 7, 8, and 9 of Schedule "A(1)" and Items 2, 9, 15(b), (c), (h), (i), (k), (l), (m), (n), and 16 of Schedule "A(2)".

JAMES AND PAMELA MOIR

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
LOUIS A. RICE, Member

APPEARANCES:  
REX BISHOP, representing the Applicant  
  
NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 15 December 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program dated July 7th, 1989 disallowing the claim of Mr. and Mrs. Moir.

In their claim, the Moirs asked that the Ontario New Home Warranty Program pay them \$20,000 representing part of their deposit paid to the builder on the purchase of a vacant lot and the home to be built on the said lot. The builder had refused to refund the deposit. The claim is based on Section 14(1) of the Ontario New Home Warranties Plan Act which reads as follows:

14(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

Although the deposit was \$30,000, the Moirs were only entitled to claim \$20,000 because of the limits set by Section 6(1) of the Regulations of the Act.

The Ontario New Home Warranty Program denied their claim for the following reasons:

1. The deposit, while it may have been made initially for the provision of a home, had become, through amendments in the contract and subsequent agreements, a deposit against land alone and, therefore, was not covered by the Warranty in Section 14(1)(a).

2. Even if the deposit was considered to be for the provision of a home, the vendor was prepared and able to build the home but was prevented from doing so by the Moirs.

It is to be noted that this second ground for rejecting the claim was only raised during the hearing of the case. Only the first ground was invoked by the Program in their judgment refusing the claim.

Mr. James Moir was the first witness to testify. He stated that on October 11th, 1988, he and his wife entered into an Agreement of Purchase with Stonehenge Builders (1984) Inc. wherein the builder agreed to sell a lot of land and to build a custom plan home for the Moirs for the price of \$407,880. As appears in the Agreement of Purchase, filed in Exhibit 4, tab 3, the Moirs made a deposit of \$30,000. The home was to be completed and delivered by May 1st, 1989.

At the time of the purchase agreement, Moir received a document filed as tab 2 in Exhibit 4 which listed the prices of certain models and stated in the final paragraph

These lots will be developed as custom designed residences. As an estimate of value use \$189,000 as a lot value and \$80 per square foot of finished space as a guideline for ultimate price, based on our current specifications.

Mr. Moir testified that this price was more than the one agreed to for his property, viz. \$180,000. In analyzing the purchase price of \$407,880, together with the price per square foot to build the home and the cost of extras, it appears that the price allocated for the lot was \$180,000.

Mr. Moir stated that by February, 1989 the builder had not begun construction of the home because it was unable to obtain a permit from the City of Burlington. In April 1989, the builder asked Mr. Moir and his wife to a meeting at which Mr. Milroy, the principal of the builder, told them the Company had run into

financial difficulties and that various trades had even put liens on certain lots. At that time there were numerous other incomplete homes even though the delays for delivery had expired.

Mr. Moir testified that it was clear that the builder was not going to be able to meet the May 1989 delivery date.

Because of his numerous difficulties, the builder proposed that the Moirs purchase the lot outright and then sign another contract engaging the builder to build the home. This would prevent any trades from having the right to take a lien against the property based on claims against the builder.

On May 14th, 1989 a meeting was held at which Mr. Milroy, Mr. and Mrs. Moir, and Mr. Cass, the attorney of Mr. and Mrs. Moir, were present.

At that meeting, the builder asked the Moirs to sign a document produced as Exhibit 6 in which they were to purchase the land alone for the sum of \$207,000. The Moirs categorically refused to sign the document because it did not represent the agreement reached. The Tribunal accepts this in view of the fact that the agreement was never signed. The discussions centred on the question not only of the sale of the land, but also of what was to happen with the deposit of \$30,000. Mr. Milroy wanted to keep it, whereas the Moirs were intent upon it being used for the construction of the home.

The Moirs made clear that they did not want to sign an independent agreement for the purchase of a lot, but were prepared to sign an amendment to the original agreement whereby they would agree to pay outright the amount allocated for the lot; that is, \$180,000. This, Mr. Moir claimed, was done to protect any future claim that he might be able to make against the New Home Warranty Program in the event of a default by the builder.

As a result of the meeting, the parties signed what was described as an Addendum to the Agreement of Purchase and Sale; the Addendum was handwritten by the attorney of Mr. Moir and filed as tab 6 in Exhibit 4. It reads as follows:

Addendum to Agreement of  
Purchase & Sale between

Stonehenge Builders (1984) Inc. and  
Pamela Moir and James Moir dated  
October 11, 1988



The parties agree to amend the said agreement by transfer of the lot (55, plan 20M-440) to the Purchasers on May 19, 1989 at the price of \$210,000, free and clear of encumbrance.

Purchaser may, if financing is not available for the purchase, extend closing to May 31, 1989.

The deposit of \$30,000 under the Agreement of Purchase and Sale will remain as a deposit on the construction obligations of the Vendor.

Vendor will at its expense complete the minor variance necessary on lot width.

Vendor will commence construction within 5 days of lot transfer to Purchasers.

Progress payments are amended from those shown on Schedule "A" to

\$30,000 on contract  
\$30,000 when roof is on  
\$30,000 when drywall is installed

Balance on completion

Dated this 14th day of May, 1989

Stonehenge Builders (1984) Inc.

I have authority

Witness

"I. Milroy" to bind the Corporation  
A.S.O.

"

"

"James Moir"  
James Moir

"

"

"Pamela Moir"  
Pamela Moir

It is to be noted that in the first paragraph the sum mentioned for the price of the lot is \$210,000. In the third paragraph, the parties agree that the initial deposit of \$30,000 remains as a deposit on the construction obligations of the vendor.

Finally, the vendor undertakes to commence construction within five days of lot transfer to the purchaser.

Mr. Moir testified that the intention was to purchase the lot for \$180,000; the price of \$210,000 was not for the lot alone, but also included the original deposit of \$30,000 which was to be used on account of construction costs.

Worried, nevertheless, that the Addendum of May 14th, 1989 was not clear, the Moirs had their attorney draft a new Addendum filed as tab 7 in Exhibit 4 which reads as follows:

ADDENDUM TO AGREEMENT OF  
PURCHASE AND SALE BETWEEN

STONEHENGE BUILDERS (1984) INC. and  
PAMELA MOIR and JAMES MOIR  
dated October 11, 1988

The parties agree to amend the said Agreement by transfer of the lot (55, plan 20M-440) to the Purchasers on May 19, 1989 at the price of \$180,000, free and clear of encumbrance.

Purchasers may, if financing is not available for the purchase, extend closing to May 31, 1989.

The deposit of \$30,000 under the Agreement of Purchase and Sale will remain as a deposit on the construction obligations of the Vendor.

Vendor will at its expense complete the minor variance necessary on the lot width.

Vendor will commence construction within 5 days of lot transfer to Purchasers, and complete dwelling by August 30, 1989.

Progress payments are amended from those shown on Schedule "A" to:

\$30,000 on contract;  
\$30,000 when roof is on;  
\$30,000 when drywall is installed;  
Balance on completion

Dated this 15th day of May, 1989

SIGNED, SEALED & DELIVERED )	STONEHENGE BUILDERS (1984) INC.
in the presence of )	Per
)	<u>"Ian Milroy"</u>
)	
)	<u>"Pamela Moir"</u>
_____)	Pamela Moir
Witness )	
)	<u>"James Moir"</u>
_____)	James Moir
Witness )	
)	

Mr. Moir testified that he brought the Addendum directly to Stonehenge Builders and that Mr. Milroy signed on behalf of the builder on May 15th, 1989, after he had received an explanation of the replacement document.

As appears in the Addendum, which all parties say was signed after the May 14th Addendum and which bore the date of May 15th, 1989, the price for the lot was clearly specified as being \$180,000; in addition, the paragraph dealing with the deposit of \$30,000 was identical to the original Addendum, as was the undertaking to build the home within five days of lot transfer.

It is to be noted, therefore, that the purchase price of the lot and home remained \$407,880. All that had changed was that payment in full was made for the lot and a new schedule of payments against future construction was made. The Moirs agreed to pay \$90,000 from the time construction began until the drywall was installed.

Mr. Moir testified that the \$180,000 was paid and the land transferred as per the amendment to the Agreement. This appears in tabs 9 and 10 with the Statement of Adjustments. The first Statement erroneously referred to the sale price as \$210,000 and was replaced by tab 11 of Exhibit 4, entitled "Amended Statement of Adjustments", which clearly indicated that the sale price was \$180,000. The Amended Statement of Adjustments was prepared by the attorney of the builder which acknowledged receiving full payment for the land in the amount of \$180,000. The Land Transfer tax was calculated on a sale price of \$180,000.

The Deed of Transfer, Exhibit 4, tab 13, also indicates that the consideration for the purchase of the property was \$180,000. The Transfer Deed bears the date of May 25th, 1989, the date from which the builder had five days to begin construction of the home. The Transfer Deed was also prepared by the attorneys for the builder.

As at May 25th, 1989, therefore, the builder had received payment in full for the land and retained a deposit of \$30,000 against construction of the home which was to begin no later than May 30th, five days after the date of transfer.

Mr. Moir testified that by June 2nd, 1989, the builder had still not begun construction. As a result, he contacted Mr. Milroy and set up a meeting at his home for June 2nd, 1989. At that meeting, he was told again about the builder's financial problems.

Mr. Moir suggested that the parties terminate the contract and that the builder refund the \$30,000 deposit. At that time, Mr. Moir knew that the builder was in very serious difficulties, not only because of the problems with his own property, but also because of a newspaper article in the Spectator, filed as Exhibit 7, which spoke of a meeting of 50 residents who had purchased from the same builder and had serious complaints. Some also sought refunds of their deposits. Knowing the builder's financial difficulties, Mr. Moir did not seek a refund of \$180,000 for the land, but was prepared to retain the land.

Mr. Milroy said he would think about it; on June 5th, 1989, Mr. Milroy phoned Mr. Moir and said he planned to go ahead and build the home because he was in no position to refund the money. Mr. Moir refused saying it was clear that Stonehenge would not be able to build it because it had already failed to build the homes of other people in the subdivision.

Mr. Moir then went to the Ontario New Home Warranty Program to explain his problems. He was told to fill out a claim for \$20,000, being the maximum permitted for deposits.

Mr. Moir testified that he could find no other builder prepared to construct for the same price as Stonehenge and, as a result, has had to put the lot up for sale at an asking price of \$250,000. To date, no one has purchased the lot and he is presently living in a rented home.

In cross-examination by Mr. Milroy, Mr. Moir stated that Mr. Milroy had been forthright in revealing his financial difficulties and that he was told by him on June 2nd, 1989 that he would not be able to execute the building of the home.

The next witness to testify was Peter Cass, the attorney of Mr. Moir. Mr. Cass stated that he became aware in March 1989 about the construction and financial problems of Stonehenge. This culminated in a meeting on May 9th, 1989 with his client, Mr. Moir, at which time he told him that because of the liens Stonehenge was

facing, Moir should take title to the lot so that there would be no danger of its being taken over by creditors of Stonehenge.

Mr. Cass stated that he intentionally did not make a new contract with a different company, but rather proceeded by way of an Addendum to the original agreement in order to protect any claim his client might have against the New Home Warranty Program for the \$30,000 deposit. Mr. Cass then testified that at the meeting of May 14th, 1989, tab 6 was prepared in which the sum of \$210,000 was shown. The Agreement had been written after a meeting of some three hours between the parties and was based on a sale price for a lot of \$180,000. When he spoke to Mr. Moir the next day, he realized that the \$210,000 was not the correct price for the sale of the lot and, therefore, prepared a new Addendum which clearly indicated the price of the lot as being \$180,000.

He stated that the transaction itself closed on the basis of a sale price of \$180,000, that all documentation filed was based on the price of \$180,000 and that the Land Transfer tax was based on the same price.

He was, therefore, surprised to receive a copy of a letter sent by the builder's attorney to the New Home Warranty Program filed in Exhibit 4 as tab 15, in which the attorneys claimed that the purchase price of the lot was \$210,000. He immediately contacted the Ontario New Home Warranty Program to state that he would send an answer to the letter the contents of which were false.

Before the New Home Warranty Program even received the letter of Mr. Cass, it had issued its decision

Mrs. Moir testified that while she was present at the May 14th meeting, it was agreed the land would be conveyed for \$180,000. She stated that because she found the first document, tab 6, unclear with respect to the purchase price, she had it replaced by a clearer document, tab 7, which was eventually signed by all the parties.

The following witness, Jennifer Case, secretary to Mr. Cass, stated that she contacted the lawyer of the builder to specify the sale price was \$180,000 for the land. She calculated the Land Transfer tax on this sale price. It was pursuant to her conversation with the lawyers that they sent her the Amended Statement of Adjustments.

The final witness was Mr. Ian Milroy, representing the builder. He stated that he carried on all negotiations on behalf



of the company. His company began encountering financial difficulties in early March 1989. It was only in April 1989 that he began to realize the enormity of the difficulties. It was then that he contacted the Moirs.

Mr. Milroy stated that he signed the tab 7 Addendum on May 15th; that is, after the tab 6 Addendum; nevertheless, he felt that tab 6 represented the real Agreement between him and the Moirs. He stated that on June 2nd, 1989, he appeared before the City of Burlington on the variance, at which time it was passed. Despite this, he did not seek the Building Permit that day, even though it could have been issued. It is to be noted that at this time, he was already beyond the delay of five days to begin construction.

Mr. Milroy admitted that all official documents dealing with the conveying of the lot indicated a purchase price of \$180,000. Even though he felt the price should be \$210,000, he admitted that he had made a mistake and, therefore, proceeded to the closing. Mr. Milroy also admitted that the \$30,000 deposit was to be against construction. This testimony contradicts his contention that the sale price was to be \$210,000.

He stated that his company is no longer operating and there is no cash in the bank. He further admitted that as of June 5th, 1989, his company was insolvent in the accounting sense; that is, its liabilities exceeded its assets and equity.

With respect to the newspaper article filed as Exhibit 7, Mr. Milroy admitted that one Mr. Mantel had not received reimbursement of his deposit and that the other claims for deposits had not been paid.

Mr. Milroy admitted that the construction of the home did not begin five days after the transfer of the land.

While claiming that he would have been able to proceed with construction of the home within the budget set in the contract, Mr. Milroy admitted that his company had no money in the bank in June, 1989 and that there were many liens against his different properties.

Based on the testimony of the witnesses, as well as the documents filed, the Tribunal believes that the purchase price of the lot was \$180,000. The official documents clearly indicate a sale price of \$180,000. Wherever the price in one document was unclear, it was replaced by another document which unambiguously specified a sale price of \$180,000.

The Agreement in Exhibit 4, tab 7 is short and concise; it could leave no doubt in any party's mind as to the sale price. Furthermore, the actual price disbursed was \$180,000 and the registered transfer stated a price of \$180,000.

In addition, even the unclear documents state that the deposit of \$30,000 remained a deposit to be used for construction costs.

On the basis of the foregoing, it is untenable to argue that the \$30,000 deposit was for the purchase of land only. On the contrary, the deposit was indisputably made for the provision of the home and, therefore, falls within the warranty provisions of Section 14(1) of the Ontario New Home Warranties Plan Act.

The New Home Warranty Program has argued that even if the deposit did come within the Ontario New Home Warranties Plan Act, the Moirs are still not entitled to reimbursement because the builder was prepared to construct the home.

The Tribunal finds, as a matter of fact, the builder not only breached his undertaking to begin construction within five days of the date of the Deed of Transfer, but that even after the expiration of the five days, he would have had no possibility of proceeding with the construction of the home. All the evidence before the Tribunal indicates that the builder was in extreme financial difficulty, that it had ceased operations, and was embroiled in legal claims and liens with sub-trades and customers. Saying he was prepared to go ahead with the construction is not proof that he could have done it. Indeed, the builder's actions and its financial condition clearly demonstrate that it could not have proceeded with the building of the home. This is undoubtedly the reason why Mr. Milroy did not try to obtain a permit on June 2nd, 1989 even though it was available.

While admitting he did not have any financial resources to build, Mr. Milroy said that in the case of the Moirs he could do so based on the payments that they were to make on account of the construction.

The Tribunal finds that this statement is untenable. By the terms of the agreement, the builder was only entitled to receive \$90,000 from the time the construction began until the drywall was installed. The sum of \$90,000 was far less than the amount the builder would need to cover the actual construction costs up to that point. Furthermore, given the problems with the sub-trades, it is inconceivable that the builder could have engaged them to build the home.

Mr. and Mrs. Moir were entitled to put an end to their contract when the builder failed to begin construction within five days of the lot transfer; that is, as at May 31st. In addition, it is clear that the builder could not have proceeded with the construction of the home after May 31st even if it had wanted to.

The Tribunal, therefore, finds that the Moirs are entitled to receive payment of their claim from the Ontario New Home Warranty Program. Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim.

G.S. MONGIA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

MR. AND MRS. MONGIA, appearing on their own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 4 December 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the New Home Warranty Program rendered April 18th, 1990 disallowing certain claims by Mr. and Mrs. G.S. Mongia arising from the construction of their home. The claims are based on Section 13 and 14 of the New Home Warranties Plan Act (the "Act").

The Applicants had two complaints:

1. Squeaks in the front hall floor; and
2. Loose and cracked tile.

The Program rejected the claims as being not warranted under the Act. It found that the squeak in the front hall was very minor and occurred only under special circumstances. As to the loose and cracked tiles, it found that the loose tiles had been repaired and that the cracked tiles were not covered because the warranty had expired.

The first witness to testify was Mr. Mongia, the owner of the home. He stated that he had bought it for \$348,000 in May 1988 and was the first owner to occupy the home. He submitted to the builder and the Program a lengthy list of problems within the first ninety days of occupancy. The builder corrected all these

problems except for the squeaks and cracking tiles.

Mr. Mongia submitted a memorandum (Exhibit 4) which set out the problems. He believed that the squeaks under the ceramic tiles were unacceptable and were the result of poor workmanship in the construction of the plywood subfloor. As for the cracked tiles, he believed this resulted from the floor shifting.

He testified that the workers did only patch-up repairs rather than tackling the main problem of the subfloor. As a result, the squeaking problem was not corrected.

He also stated that more than 25 tiles had been replaced on the main floor and that there were 7 more that had to be replaced because of being cracked.

Mr. Mongia then deposited as Exhibit 5 three estimates for the repair of the tile work and subfloor which ranged from \$4,457. to \$5,077.

In cross-examination, Mr. Mongia stated that the subfloor plywood was probably of good quality. He also testified that the cracks in the tile were hairline and followed no particular pattern in their occurrence.

The Applicant concluded with the proof of his case based on his own testimony only. He produced no expert witnesses to establish that the work on the subfloor was deficient or defective; he produced no independent witnesses to establish the level of noise or squeaks from the tiles.

With respect to the estimates produced by the three tile companies, the Tribunal will only rely upon them to establish the price of the work for which the Applicant sought the quotes. Their terms of reference are such that they cannot be relied upon to establish that there is defective work or materials. If this had been the intent of the Applicant, either the experts should have written full length reports which clearly specified the nature of the problems and their underlying cause or he should have asked one of the tile experts to testify before the Tribunal, where he could also be cross-examined.

Mr. Al Bodogh, an inspector with the Program, testified that he went to the Applicant's home five times, viz. the 21st of February, 23rd of May, and 9th of August, 1989, and the 8th of February and 3rd of December, 1990. He went specifically with respect to the problem with the squeaks.

He said that he could not hear squeaking sounds when



walking in the hall in a normal manner. When he walked with a "bounce" in his step, there was a minor squeak. He said that Mr. and Mrs. Mongia had to jump up and down on the floor to obtain the squeaking sounds.

The squeaking in any case was minor and caused by normal wood shrinkage. If the noise had been excessive, the problem would be covered by the Act.

He then presented photographs to show the Tribunal the cracks in the tiles. In one area, the hairline crack in a tile covered its whole area. He did not think that the cracks in the tile had occurred because of a deficiency in the construction of the subfloor. A photograph showed that wire mesh and cement had been used in the construction of the subfloor and that the construction itself was of good quality.

Mr. Bodogh stated that the quality of the framing and floor joist was good, very much above average.

The Tribunal took note of Mr. Bodogh's report based on the inspection date of February 8, 1990. After referring to the four visits, he had made to the home he wrote:

...Each time it has been judged acceptable by the Warranty Program. On two of these occasions, if after some searching, the Homeowner moved up and down on one particular spot a minor squeak could be heard but when walking normally from one point to another no squeaks were heard. This is classified as acceptable.

The final witness was Saul Anisfeld, President of the builder company. He testified that the company built approximately 75 homes a year.

When questioned about the 25 tiles that had been replaced, he stated that some were damaged when other damaged tiles were being replaced. He said that the company had done everything it could to try to satisfy the Applicants, but without success. He referred the Tribunal to a letter sent April 2, 1990 to the Program in which his company offered to replace the cracked tiles in the kitchen with matching tiles from the powder room because the distributor no longer carried tiles which matched the existing tiles in the kitchen. The company would then retile the powder room with the tiles of the Applicants' choice from the company's standard or upgrade selection. The Applicants refused this offer because they wanted the tiles in the powder room to match exactly

the tiles in the kitchen. Mr. Anisfeld informed the Tribunal that the company was still prepared to abide by this offer.

The Tribunal finds that the Applicants, on whom the burden of proof rests, have not proved the existence of a defect either in the construction or materials in the home. From the evidence, the noise from the squeaks does not appear excessive; it also does not occur when people walk normally on the floors. The evidence presented leads the Tribunal to conclude that the construction of the floor satisfied a superior standard.

While homebuyers are entitled to a home constructed of good quality, they cannot expect perfection. It is notorious that buildings are constructed of wood that shrinks from drying out over time; no house can be totally free of sounds when one walks over the floors or tiles. As a result of settling, cracks will appear in garage and basement floors as well as in walls. These are to be expected by any homebuyer.

As for the problem of the cracked tiles, the Tribunal finds that the offer by the builder is a reasonable one. There is no reason for the tiles in the powder room to have to match those in the kitchen. They are two separate rooms. The refusal, therefore, of the Applicants to accept the offer was unreasonable. The Tribunal finds that the 7 cracked tiles should be replaced in the manner proposed by the builder.

The Tribunal, therefore, by virtue of the authority vested in it under Section 16(3) of the New Home Warranties Plan Act, directs the Ontario New Home Warranty Program to have the builder replace the cracked tiles with matching tiles from the powder room; the whole under the direct supervision of the New Home Warranty Program. The Program will also have the builder replace the tiles in the powder room with a tile chosen by the Applicants from the standard or up-grade selection of the builder. This judgement shall only be carried out if the Applicants agree to it. Should the Applicants refuse to allow the builder to proceed as set out above, the Program is ordered to proceed with its original judgement, viz. to reject the claims of the Applicants.

BRIAN NOLAN

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
STEPHEN PUSTIL, Member

APPEARANCES:

BRIAN NOLAN, appearing on his own behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 8 November 1990

Toronto

#### REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered February 21, 1990 disallowing certain claims of Mr. and Mrs. Nolan relating to the brick work of their home. The claims are based on Section 13 and 14 of the New Home Warranties Plan Act, alleging deficient workmanship with respect to the stacking joint at one corner of the home and with respect to a gap between the porch slab and the wall of the home.

The Tribunal notes that the judgement of February 21, 1990 did not contain certain notices which the Program normally inserts. As a result, it does not have the appearance of a judgement. The Tribunal has been assured that the Program will in the future draft its judgement letter in a manner which clearly gives the appearance of a judgement.

The first witness was Mr. Brian Nolan, the owner, who stated that he purchased the new home which was to be built by Century Homes on December 12, 1986 for \$174,900. He moved into it in February, 1988.

In the Certificate of Completion and Possession (Exhibit 4), Mr. Nolan complained that the stack mortar joint was coming apart. This joint was at the southeast corner of the house and consisted of a vertical section extending from the foundation to

the under-side of the front porch. He also complained about insufficient or non-existent caulking between the wall and siding.

To better understand the facts of the case, one must first describe what a stacking joint is. Normally, at the corners of a home, the bricks come together at a ninety degree angle and therefore overlap. In the case of a stacking joint, the bricks come together in a completely different way; two sets of bricks meet at the corner in such a way that the inside tip of each brick touches the inside tip of the other brick at the point most inside the brick wall. Where the tips touch, they form a very acute angle and each brick forms one side each of an isosceles triangle. The base of the triangle is the gap at the front facing of the brick where the two sets of bricks are furthest apart. This gap will vary in accordance with the angle at which the bricks meet on the inside of the wall. The smaller the angle, the narrower the gap will be. In this configuration, the bricks do not interlock, but rather are stacked one upon the other vertically creating a gap between the bricks which is in a shape of a triangle and which runs the full vertical length of the bricks at that corner. The gaps so created must be filled with mortar; the workmanship required is much more demanding for a stacking joint than for ordinary corners of a wall.

Mr. Nolan testified that except for the stacking joint at the southeast corner, the face of the gap in the other stacking joints was  $\frac{3}{4}$  of an inch or less. At the southeast corner, however, it ranged from  $\frac{3}{4}$  of an inch to in excess of  $1\frac{1}{2}$  inches along an eight foot vertical distance.

He complained that the joint began coming apart creating a crack in the mortar running along the full eight feet distance. The brick walls instead of being held together by the mortar in the gap, apparently separated, thereby creating the crack.

Mr. Nolan, who has a great deal of knowledge in this area, testified that the mortar in the gap was not properly applied. He also believed that the gap itself breached the requirements of the Ontario Building Code in that the Code allows only for a maximum of  $\frac{3}{4}$  of an inch as a gap between bricks.

He testified that the builder came four times to dig out the mortar and re-point it. Each time the stack joint opened up again some two weeks later. The builder finally rebuilt the wall, but without success since the crack in the mortar developed again. The builder tried again six times to re-point the brickwork in such a way that the mortar would adhere and eliminate the crack. The builder finally gave up in the fall of 1989 and never returned.



Mr. Nolan complained to the Program within the first year, and the problem with the stack joint remains the same today as it was when he first complained. He asked the Program to have an engineer check the problem and propose a solution but the Program refused. He had a building inspector inspect the stacking joint and Mr. Nolan claims that the building inspector was of the impression that the joint was in excess of the maximum allowed under the Ontario Building Code.

The Program in its Reinspection Report of June 23, 1989 (Exhibit 10) was of the opinion that the stacking joint satisfied the requirements of the Ontario Building Code.

Mr. Nolan produced photographs to the Tribunal (Exhibit 8(a) and following) that clearly showed the width of the gap and the crack in the mortar. The crack was far more than a hairline crack and extended approximately eight feet vertically in distance. The gap varied from  $3/4$  of an inch to approximately 2 inches.

Mr. Nolan also testified that the New Home Warranty Program arranged with the builder for an engineer to inspect the home, but never informed Mr. Nolan nor did it inform Nolan of the date of the visit, despite the fact that Mr. Nolan had made such a request to the Program and had been assured that the Program would give him notice.

His photographs also clearly illustrated the unacceptable gap which existed between the porch slab and the home wall. One could see a great deal of mortar was missing thereby creating the gap.

In cross-examination, Mr. Nolan testified that he is a refractory brick layer but does not lay bricks for houses. He considered himself to be knowledgeable in brick work on homes because the principles of use of mortar and laying bricks was the same in both areas.

He stated that the gap in the stack joint was one inch to  $1\frac{1}{2}$  inches wide for the major part of the eight foot length. He testified that the crack in the mortar had progressively widened and was an  $1/8$ th of an inch thick. Some mortar had fallen out from the joint.

When asked what he sought from the Program, he stated that he wanted the joint fixed so that the mortar adhered properly rather than separating to form a crack and/or falling out. He also wanted the stack joint gap to be closed to allow for a gap of no more than one inch.



The next witness was Mr. Jim Fortune, a conciliator with the Program. He testified that he first went to the Nolan home June 19, 1989 for a reinspection. The builder was present, together with Audrey Dunham who had done a previous inspection for the Program. He testified that the crack in the mortar was wide enough that he could insert a business card into it.

When asked if the gap exceeded that permissible under the Ontario Building Code because it was more than  $3/4$  of an inch on its face, he testified that it satisfied the Code because the measurement of the width of the gap had to be taken from a mid way point between the rear of the brick where it met and its face where it was furthest apart. Under such circumstances, he believed that the gap at its midpoint would be no more than  $3/4$  of an inch.

He believed that the mortar should be repointed in the stack joint because the crack was more than a hairline crack. As such it came with the warranty of the Act.

He testified, however, that at the time he wrote his reporting letter on September 13, 1989, he was not aware that there was a crack. Had he known, he would not have decided that the stack joint fully satisfied the warranties of the Act. That is, he would have ruled that the repairs by the builder were not sufficient. When asked about the gap between the porch slab and wall, he testified that this would require a reinspection because it was unacceptable.

The Tribunal asked Mr. Fortune whether a home owner would normally be informed of the date when an engineer was expected to inspect a home. He stated that he normally would be, in order that the home owner could attend the meeting.

The next witness was Mr. Tony Alexander, an expert in the area of brick work and mortar. He issued an experts report on January 30, 1990 filed as Exhibit 15. The report itself concluded that the stack joint was properly built and that the crack which he described as hairline resulted from thermal movement of the brickwork.

He testified that he went to the Nolan home on January 26, 1990 at the request of the builder. Mr. Doug Irvine of the Program was present, together with a representative of the builder, but the homeowner was not present. He saw the crack which was at least 8 - 9 feet in length. There was a paperclip in the crack at one point and photographs were shown which illustrated this. At the time, he only did a ground inspection but now feels that he should have gone higher and in more detail, given the testimony he had heard.

He was of the opinion that the crack developed because of thermal movement. He remembers that at the time of the inspection he was not really interested in the width of the gap because he did not think that it was the cause of the crack. He was also of the opinion that the section of the Ontario Building Code dealing with width of gaps did not apply to stack joints. Such a stack could vary in his opinion from 1/2 an inch to six inches or more and satisfy the Code providing the mortar bonding the bricks was properly applied.

Having heard the testimony, he was now of the opinion that the crack should be sealed with suitable materials which would prevent cracking because of thermal movement.

At the time of the visit, he was not aware that the builder had tried on numerous occasions to correct the mortar work. In cross-examination, he stated that the fact that the cracks appeared within two weeks of repairs demonstrated that the job was not properly done. He would have recommended that the builder put in a thermal joint in a gap of that width. This would eliminate the potential for hairline cracks to develop in the joint.

The Tribunal has observed that had the homeowner been informed of the impending visit by the inspector, he would have been present to inform Mr. Alexander of all the facts relating to the stack joint. His absence left Mr. Alexander in a position where he did not have certain facts which were very material in reaching a decision.

The final witness was Doug Irvine, senior conciliator with the Program. He testified that he went to Mr. Nolan's home the first time in January, 1990 with the expert, Mr. Alexander. Even though he had had a call previously from Mr. Nolan complaining of the crack and asking the Program to have an expert visit the home, he never informed Mr. Nolan of the date the inspector would come. At the same time, he admitted that Mr. Nolan should have been informed.

In argument, the attorney for the Program stated that the Program was prepared to repair the crack in a satisfactory manner.

At the outset, the Tribunal believes that Mr. Nolan has not been treated in a proper manner by the Program. He was not given notice of the date fixed for an inspection by the engineer even though he had been the first to request that an expert visit the premises. In addition, the Program, in general, failed to communicate with Mr. Nolan and when it did so, the tone of its communications were peremptory and non-conciliatory. The letter

which the program treated as being its judgement had serious omissions - upon perusing it, any reasonable person would be hard put to realize that it constituted a judgement. The Tribunal believes that had proper communication been maintained, the problem could have been solved amicably.

The Tribunal finds that on the basis of the evidence, Mr. Nolan has proved that the stacking joint was not completed in a workmanlike manner. The Tribunal, however, believes that the work can be repaired without the face of the gap being narrowed. The evidence indicates that the face of the gap did not breach the Ontario Building Code by being in excess of  $3/4$  of an inch. The Tribunal does not believe that the section of the Ontario Building Code dealing with this matter could cover stacked joints. The nature of these joints allows for a gap of more than  $3/4$  of an inch and in many cases a wider gap would be warranted for aesthetic reasons. The Tribunal found the expert's testimony thereon very credible.

Having heard the testimony, seen the photographs and documents, the Tribunal finds that there is a crack in the mortar which is more than a hairline crack, that it came into existence at the time that the homeowner took possession of the home, that the Program was informed of the problem within the required delays, and that despite repeated attempts by the builder, the problem has not been remedied. While the face of the gap may be as much as two inches at certain parts, the Tribunal does not believe that this in any way detracts from the aesthetic appearance of the brickwork or its safety.

This being the case, the Tribunal believes that the stacking joint can be repaired. The Tribunal, therefore, orders by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Program to see to the repair of the stack joint by having the builder or some other designated contractor remove all the mortar in the stack joint from its face all the way back to the tip where the bricks meet. The mortar is to be replaced with a suitable mortar, including an expansion joint, and protected by a flexible caulking which must match the existing colour of the mortar in the wall. The repair work shall be supervised by Mr. Tony Alexander. The repair work shall be deemed to have been completed in a workmanlike manner upon its acceptance by Mr. Alexander.

The Tribunal also orders the Program to have repairs carried out to replace the missing mortar between the porch slab and the wall in the home. Mr. Alexander shall again supervise the work and his acceptance shall be required before the repairs are deemed to be properly done.

DOMENICO PARROTTA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
LOUIS A. RICE, Member

APPEARANCES:

DOMENICO PARROTTA, appearing on his own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 8 March 1990

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Mr. Parrotta, took possession of the subject home on April 30, 1987. The Applicant submitted his claim to the Program by letter dated December 1, 1988. Subsequently he requested the Program to conciliate. The home was inspected by the Program on seven different occasions. A Conciliation Report was issued dated May 4, 1988, followed by a reinspection Report dated August 3, 1988. Finally the Program issued its final decision dated September 7, 1989, and Mr. Parrotta requested subsequently this hearing to review that decision.

1. The first item being pursued by the Applicant relates to a bulge in the wall above the fireplace. Mr. Parrotta testified that this bulge is quite evident, whereas the Program inspector, Mr. Sutherland, considers it to be "very minor". Mr. Parrotta testified that he reported this bulge to the site superintendent shortly after taking occupancy. He is, however, unable to provide any evidence of a written claim as to this item. The Program takes the position that no notice of this claim was provided to it, in writing, within the first year warranty period. Notably, it is not mentioned in Mr. Parrotta's December 1, 1988, list. The regulations under the Ontario New Home Warranties Plan Act require each person



with a claim to give written notice of that claim to the Program within the warranty period. As this requirement has not been satisfied, the Tribunal must disallow this item.

2. The next item relates to the painting of the kitchen hallway walls. This was originally painted to match the colour of the kitchen walls, but had to be repainted because some of the paint was peeled off when some tape that had been used to attach protective plastic sheets to the walls was peeled off. The repainting was carried out in a workmanlike manner, however, in a darker colour and in a semi-gloss paint, rather than a flat paint, such that these walls no longer matched the kitchen walls. The Tribunal has some sympathy for the Applicant as to this item, however, it is strictly an aesthetic matter that is complained of. There is no evidence that the walls are unsightly, simply that they do not match the other kitchen walls. Mr. Parrotta's remedies against the Program are limited to the warranties enacted under the Ontario New Home Warranties Plan Act. The warranties are set out in Section 13(i)a of that Act as follows:

13(1) Every vendor of a home warrants to the owner,

- (a) that the home
  - (i) is constructed in a workmanlike manner and is free from defects in material,
  - (ii) is fit for habitation, and
  - (iii) is constructed in accordance with the Ontario Building Code
- (b) that the home is free of major structural defects...

It is clear that with respect to this item, none of the above noted warranties have been breached. The Tribunal, therefore, has no jurisdiction to allow this item. This is not to say that Mr. Parrotta does not have any contractual rights against the builder. These may (or may not) exist, but are in any event



beyond this Tribunal's jurisdiction to consider.

3. The next complaint relates to a bulge in the main hall wall. There were some nail pops in this wall area which the builder repaired. However, there is now a bulge in the wall. Mr. Sutherland testified this bulge was also "very minor" and acceptable to him and in his opinion, the bulge did not constitute a defect in workmanship. This complaint was not put to the Program in writing within the warranty period, nor was the initial problem of nail pops. The builder did the repair work relating to the nail pops voluntarily without the intervention of the Program. Accordingly, this item must also be disallowed.
4. The next item relates to the second floor baseboards which Mr. Parrotta finds to be "too glossy" in terms of finish. He had requested a flat stain. There is no defect as to materials or workmanship. This claim must also fail as it falls within the category of a strictly aesthetic concern and is not covered by any of the Section 13 warranties. Again, this does not necessarily mean that Mr. Parrotta cannot pursue the builder on a contractual basis in another forum.
5. Mr. Parrotta characterizes the next item as his biggest complaint. The door in the garage leading to the basement does not fully open, but hits the wooden steps leading up to the door for the main level. This is the first item set out on Mr. Parrotta's December 1, 1988 list. In the Tribunal's view, the installation has not been carried out in a workmanlike manner. The door should be installed so that it opens fully. The Tribunal directs the Program to reinstall the door so that it opens fully to a 90 degree angle, and, if this is not possible the Tribunal directs the Program to relocate the door and stairs to a location acceptable to Mr. Parrotta.
6. The next complaint relates to a squeak in the last few treads of the main stairs. These steps had been leaning to the left. The

builder rebuilt the steps voluntarily by raising the steps from the bottom. The squeaking has, Mr. Parrotta testified, become worse since this work was done. The Program had found the steps as originally constructed to be level, subject to a minor, but acceptable, variance. The Tribunal accepts the Program's position that the original complaint was not warranted and that, therefore, any voluntary repairs undertaken by the builder are not warranted either. The item is disallowed.

7. The main stair wooden railway is misaligned at the joint of the rail. This is poor workmanship in the Tribunal's view and the Program is directed to repair by properly realigning the railing.
8. The hall tile floor includes approximately 20 chipped tiles damaged by the trades. The builder was required by the Program to repair these chips, however, Mr. Parrotta is not satisfied with the repairs which he considers to be noticeable. Mr. Parrotta testified that he paid over \$14,000 for ceramic upgrades and feels that he should get an unblemished floor for the price that he paid. Mr. Sutherland testified that the tiles have been adequately repaired and are not noticeable. The photograph put before the Tribunal does not disclose any noticeable repair. Again the concern here is one of aesthetics. While we have some sympathy for Mr. Parrotta on this item, it is not, in our view, covered by any of the statutory warranties. Again this does not necessarily foreclose Mr. Parrotta from seeking other remedies against the builder.
9. Two of the basement stair treads had dents in them and were replaced. Mr. Parrotta complains that the replacement treads were stained a different colour or shade. Mr. Sutherland finds the staining satisfactory. This is another aesthetic complaint and is disallowed.
10. The eavestroughing is leaking. The Program had required the builder to repair, however, this has still not been done. The Program is,

therefore, directed to carry out the necessary repairs to stop the leakage.

In summary, therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to carry out the repairs noted for items 5, 7 and 10 above. The remaining claims are disallowed.

RAMCHAND PERSAUD

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member  
D.H. MACFARLANE, Member

APPEARANCES:

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicant

DATE OF

HEARING: 23 January 1991

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. The Applicant was sent by registered mail the Appointment for and Notice of Adjourned Hearing dated the 14th day of January, 1991 as evidenced by Exhibit 4, which stated:

...hearing will be held...before the  
Commercial Registration Appeal Tribunal in  
the Tribunal's chambers, 1 St. Clair Avenue  
West, Toronto on Wednesday, January 23rd,  
1991 at 9:30 o'clock in the forenoon...

which contains the further notice:

...If you do not attend at the hearing, the  
Commercial Registration Appeal Tribunal may  
proceed in your absence and you will not  
be entitled to any further notice in the  
proceedings.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. KENNETH PORTER

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
JOHN HURLBURT, Member

APPEARANCES:

MR. AND MRS. K. PORTER, appearing on their own behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 4 July 1990

Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. K. Porter purchased a home from Wimpey Homes at 211 Lake Driveway West, Ajax and took possession on March 22, 1987.

They are appealing to this Tribunal as a result of the decision of the Ontario New Home Warranty Program dated January 16, 1990 disallowing three claims: one for a shower stall which they allege to be defective; two, for carpeting which was improperly repaired on the upstairs landing after the staining of the staircase spindles; and three, the actual staining of the spindles which they allege are not done properly.

Mr. Porter, in his evidence, points out that the staircase was improperly treated in that it should have been stained a walnut colour for which he paid extra and we note he paid \$250.00 extra for this staining. Prior to possession, he says he looked at the staircase and it was not done. In the process of staining the staircase, the builder pulled the carpet up and damaged it since it has now left seams. He says the painter advised the builder that they could not stain a sealed wood, but the builder insisted on proceeding.



With regard to the shower stall in the ensuite bathroom, Mr. Porter alleges that water leaks out of the stall. A Mr. Davidson of Wimpey Homes examined the damage and said the shower stall was designed for shower doors. The water runs along the ledge on the right hand side of the tub on to the floor. Mr. Porter does not like shower doors because they are too difficult to clean, but said he might give it serious consideration. He points out that his wife does not like shower doors because she suffers from claustrophobia. There is, he points out, damage to the drywall and moulding and although Wimpey offered to come in and install doors on the shower, conditional upon him releasing them from any other complaints about the staircase, he declined this offer.

With regard to the carpet, he points out that the builder in staining the spindles on the staircase at the top of the stairs removed part of the carpet and when the carpet was reinstalled, the seams became very visible. He now asks that Wimpey replace the carpet.

The conciliation was held on November 22, 1988, when Mr. Thurston, Mr. Porter, Ray Taggart for the builder and Ashmore Stewart were present, and the following observation was made in the Conciliation Report:

OBSERVATION - Curved staircase is stained and even colour on most of railing, guards etc. except for wall stair stringer which has a number of artificial brush type grain lines at tread area.

Carpet installation around guard pickets has been installed by method of splitting carpet and then rolling over curved nosing on open stair area.

Shower of ensuite is a vinyl base unit with ceramic wall tiles and curtain rod with curtain installed at proper height. The base was designed apparently for door installation as opening has no return corners and little protection for water spillage on to floor area.

COMMENT - These complaints are not warranted. The staircase installation as installed is acceptable to the Program. The method of staining and final colour are contractual matters not covered under the Warranty Program.

The carpet is installed in an acceptable manner common to the industry.

Shower installation is completed in a good workmanlike manner and acceptable to the Program. The door installation is a contractual matter.

Wimpey Homes Superintendent, Ray Taggart testified that there was a minimum amount of water on the floor emanating from the shower. He had recommended silicone be applied on the ledge to stop the water draining on to the floor. The shower doors were not in the Offer to Purchase and would have been an extra. He pointed out, however, that the shower stall was designed for shower doors and that the builder had offered to install them free if the owner wished to settle the matter. He pointed out that this was simply a goodwill gesture although, to his knowledge, it had been done without conditions and was only refused by Mr. Porter's wife who suffered from claustrophobia.

Mr. Taggart further testified that the carpet people were brought in, but found the carpet satisfactory. This was installed by Quality Carpet and they found nothing unusual or defective in the installation or the material.

Mr. Ashmore Stewart testifying said that he had attended at the Porter house on September 27 for the first time in the morning to check on complaints. Subsequently, he had the carpet installer come in to see if there was anything wrong with the carpet. The carpet man, he said, pointed out that there was nothing wrong with the installation and found it completely satisfactory.

Mr. Stewart also testified that silicone was applied to the ledge of the shower, but it was now no longer there having been drained off presumably by hot water.

As far as the stairs were concerned, the workmanship was satisfactory, there being no defect in either workmanship or materials in the staircase, and the \$250 paid by Mr. Porter was for extra staining of the wood. He further testified that with regard to the shower, the only problem was fitting the shower curtain so that the water would not come on to the floor.

Morley Edward Thurston, conciliator with the Program for fifteen years, testified that the shower stall was installed in a

manner acceptable to the Program, caulking was in place, the tile was straight and plumb, and grouted properly. There was no ponding in the base of the stall. He said that some repairs had been done to the right hand side, and the source of the water coming out on to the floor was from the ledge.

Mr. Thurston in dealing with the stairs said there was some variance in colour of the stain which was acceptable to the Program. Only on one area, he said, could you notice any brush marks.

As far as the carpet was concerned, he found nothing unusual about it and testified that it was properly installed.

James Hunter, a conciliator with the Program for nine and a half years, on August 19, 1989, first attended at the re-inspection. He said the shower stall was constructed in a good workmanlike manner. When the shower was on, certain water tends to run from the ledge which had a slight slant of 1/16th of an inch towards the floor. With regard to the stairs, the stain was, in his opinion, quite acceptable from a cosmetic point of view. He could not tell in what order the stairs were sealed, either before or after the builder had applied the extra stain.

He further testified that the seams in the carpet were visible, but clearly not abnormal.

Mr. Porter, in his argument, pointed out that Wimpey "in essence had attempted to defraud us". He pointed out that standards vary and the standard of the work done in his home could not help but have a deleterious effect on the longevity of the house.

With regard to the carpet, he said not sufficient care had been taken, the seams inordinately visible and large compared to other homes.

With regard to the shower, he said that the constant water running out of the shower, with no way to repel it, ends up on the floor and must eventually damage the bathroom floor.

Mr. Martin, on behalf of the Program, points out that this owner must prove he has a claim for damages arising out of Section 13(1) for a breach of warranty, but that there is no evidence whatever of the breach of warranty because there is no defect in the workmanship and none in the materials. He points out that there is nothing defective in the carpet or in its installation, minor imperfections perhaps, but nothing

unworkmanlike in the finished product.

Mr. Martin further argues that we don't know in what order the staining was done, but what was delivered was a stained staircase according to the contract. There were no defects apparent in that and when the builder wished the extra stain applied, it was not part of the Warranty Program's liability to ensure that staining was adequate. That was a matter of contract between the owner and the builder.

In this matter, we are again faced with the problem of what is a contractual arrangement between the builder and the owner and whether or not, the defects alleged were subject to warranty.

With regard to the staircase, it appears that Mr. Porter received what was his due under the contract. He was not satisfied with that and, therefore, paid extra to have a walnut stain applied to the spindles on the staircase. In so doing, it may have been that the builder painted over a sealed wood which would, in our view, probably leave brush marks. This, however, is a matter of a separate contract between the builder and the owner and does not form part of the Ontario New Home Warranty Program's warranty. Under the circumstances, we would disallow the claim for the staining of the staircase.

With regard to the carpet, we have only the evidence of Mr. Porter as opposed to the evidence of the several other witnesses who have testified that the carpet meets the standard required by the Act. There does not appear to be any defective workmanship nor does there appear to be defective material. It is possible, even probable, that the carpet was rolled back for the purpose of staining, but it has been apparently reinstalled in a manner acceptable to those who had occasion to examine it on conciliation, although it does not apparently meet the standard Mr. Porter expected. Under those circumstances, the preponderance of evidence is against Mr. Porter and we must, therefore, disallow this claim.

The shower stall is a more troubling aspect of these claims. It is conceded by the builder that the shower stall was designed for doors. We accept, therefore, that it was probably not designed for a shower curtain, but since Mr. Porter did not pay extra for shower doors, he received a shower stall and the accompanying shower curtain. The result is that the water drains from the ledge on the right hand side of the tub on to the floor and possibly, in future, will cause some damage to the floor at the area where the tub and floor meet.

We, therefore, consider that the 1/16th of an inch which has been admitted by the builder is a variance, as a result of which the water runs on to the floor. It is clear that the builder attempted to repair this by a sealer, by building it up with silicone, but that did not last. Under the circumstances, it is in our view incumbent upon the builder to repair this aspect of the shower either by reapplication of silicone which will last or with some other material, or build up the ledge so that the water will run back into the tub and not on to the floor. This would appear to be a reasonably simple repair and manner of satisfying the complaint. We, therefore, hereby direct the builder to repair this aspect of the shower stall or in the alternative, if the shower door is the most suitable and satisfactory resolution of this matter and acceptable to the owner, we hereby direct that the builder install the shower door thereby concluding the matter.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to allow this claim and the builder is to repair the shower ledge in order to prevent the water from running on to the floor, or in the alternative, to supply a proper shower door in lieu of the present curtain.



ANIL K. RASTOGI

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GREY LESLIE, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
LOUIS A. RICE, Member

APPEARANCES:  
ANIL K. RASTOGI, appearing on his own behalf  
NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 29 May 1990 Toronto

REASONS FOR DECISION AND ORDER

Mr. Anil Rastogi appeals to this Tribunal from the decision of the Ontario New Home Warranty Plan dated January 10, 1990, disallowing his claim for damages involving four items remaining in dispute between himself and the builder.

He purchased 1154 Ballantry Road, Oakville, under an Offer to Purchase dated March 28, 1988, and took possession on the 1st day of November, 1988. It is agreed that his claims fall within the first year of the warranty, and conceded that they were filed within that time. The issue, then, is simply whether or not any or all of the deficiencies alleged fall within Section 13(1)(a) of the Ontario New Home Warranties Plan Act.

Mr. Rastogi's complaints are as follows:

In his documents he lists items currently in dispute:

- Item number 1: .34 excess supply of hot and cold  
water pipes  
water is unnecessarily wasted  
unnecessary energy is consumed  
not done in a workmanlike manner
- 2: Item 6: living room window 30 cm smaller in width  
and height

appearance of the house very different than expected

- 3: Item 13: main staircase is seven inches off centre. One aisle is visibly narrower and cannot be used as intended
- 4: Item 14: Paid \$850 for two coats of paint, only one coat done.

One June 8, 1989, Mr. G.W. Price, Conciliation officer with the Program, attended at the premises with Mr. Rastogi and the builder's representative, Mr. M.M. Hartsman. It appears all items in dispute were eventually resolved, except four, which form the subject of this appeal. The Conciliation Report, in dealing with item #1 noted that the hot water supply line in the basement ceiling is "routed such that the ensuite bathroom is farthest from the hot water heater".

It was also noted that a more direct route in the basement would have resulted in approximately 15 feet less supply piping being used",

but

this plumbing system does not infract upon the Ontario Building Code and no examples of poor workmanship were demonstrated or detailed.

Mr. Rastogi's complaint is simply based on the fact that he must waste, "over three gallons of water before hot water comes". It is obvious that a shorter route to the bathroom would bring water more efficiently to the taps, but this is clearly not a defect in either material, or workmanship, and does not constitute a breach of the Ontario Building Code. We must, therefore, consider the opinion of the conciliation officer correct, and disallow the claim.

The second item concerns the living room window. It is 30 cm. smaller than expected. Dealing with this, the conciliation officer observes, "the agreement of purchase of sale documents do not specify window size, nor are there any references made in the agreement of purchase of sale documents that specify the builder's construction drawings as forming a part of the Agreement of Purchase and Sale documents." There was another window involved in this particular dispute - that of the bedroom window. "These two windows were found in compliance with the Ontario Building Code requirements and were installed in a good workmanlike manner

apparently damage free (except as specifically noted elsewhere in this report). This is a matter of contract and/or material specification and interpretation and is outside of the jurisdiction of the Program".

The matter was dealt with in correspondence between Mr. Rastogi's solicitor and the solicitor of the builder. Sunda Lee, solicitor for Mr. Rastogi, on October 13, 1988, wrote to Mr. Siskind as follows:

I enclose herewith copies of the following:

- 1) Sketch of "The Harding, Elevation "B" being the house to be purchased by my client as set out in the Agreement of Purchase and Sale between Anil K. Rastogi and Greyrock Building Corporation marked "A".
- 2) Copy of Plans of same, showing the front, marked "B".
- 3) Copy of Plans of same, showing the side view, marked "C".
- 4) Copy of Plans of same, from the top marked "D".

Two weeks ago my client went to look at the house and discovered the following problems.

1. The height of the bay window has been shortened by 30 cm. This shortage is in the lower window.
2. The width of the bay window throughout has been shortened by 30 cm. Y

You will note that from both "A" and "B" that there should be 6 window panes on the front of the bay window, but the bay window on my client's house has only 5 window panes.

Mr. Siskind replied on October 26th, 1988:

We have now had an opportunity to review your letter dated October 13th, 1988 with our client.

We would point out to you that schedule "A" to your aforementioned letter comes from our client's brochure on which is printed the phrase 'all dimensions and specifications are approximate and subject to change without notice. All drawings are architect's concept'. Accordingly, that elevation does not form a part of the Agreement of Purchase and Sale. Our client advised that the other schedules to your aforementioned letter were obtained from our client's construction shack, and do not form part of any agreement with your client but are for our client's personal use.

In any event, our client has advised that it is not prepared to grant any credit to your client, but is prepared to release your client from the transaction and return the deposit to your client less payment for any extras ordered.

If we do not hear from you by noon on October 27th, 1988, our client's offer is withdrawn and we will be proceeding with the scheduled closing date of October 28th, 1988. In that regard, kindly advise the manner in which your client will be taking title.

The correspondence clearly indicates a contractual dispute between the builder and the owner. It is apparent Mr. Rastogi did not get what he thought he was buying and in view of the misunderstanding, the builder was prepared to release him from the contract and return his deposit. The appellant, however, elected to proceed with the transaction. It has been held in previous cases before this Tribunal that this is not a forum delegated to decide disputes between a builder and an owner in the interpretation of their contract. The jurisdiction of this Tribunal and of the Ontario New Home Warranty Program is confined to the Ontario New Home Warranties Plan Act and since this claim

does not fall within Section 13(1) of the Act, it must be disallowed.

The third item, "the centre hall style main staircase is offset approx. 7 inches to the south, relative to the centre of the first floor main hallway" is dealt with summarily in the Conciliation Report. The officer notes that the "staircase does not present an Ontario Building Code infraction or an example of poor workmanship and therefore cannot be warranted".

The staircase may not be in the exact centre of the hall, as Mr. Rastogi apparently expected it. No evidence has been brought to us of any defect in workmanship or materials and its location does not offend any provision of the Ontario Building Code. The claim, therefore, must be disallowed.

The last item concerns an extra coat of paint on all wood trim and doors for which he paid an additional \$850. He requires the second coat to be applied or the money refunded. By his own admission, and the documentary evidence, this is an extra, and a matter to be resolved only between himself and the builder. This is not an issue which concerns the Program and the claim, therefore, must be disallowed.

In conclusion for the above reasons, each of the four claims of the appellant are hereby disallowed and by virtue of the authority vested in it under 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims.



NADER J. RIFAI

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member  
JOHN HURLBURT, Member

APPEARANCES:

NADER J. RIFAI, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 5 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered September 29, 1989, disallowing the claim by Mr. and Mrs. Nader J. Rifai based on an alleged defect in their carpet. The New Home Warranty Program decided that the condition of the carpets in the family room and southwest bedroom was within the acceptable tolerance of workmanship and materials.

The claim was made to the New Home Warranty Program under Section 13(1) of the Ontario New Home Warranties Plan Act which reads as follows:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner  
and is free from defects in material.

The claim was refused because of the exclusion in section 13(2)(c) and (f):

13.(2) A warranty under subsection (1) does not apply in respect of,

(c) normal wear and tear;

(f) damage resulting from improper maintenance;

The sole issue before this Tribunal, therefore, is whether the carpets in the named rooms contain defects.

The first witness to testify was Mr. Nader J. Rifai, who stated that he purchased his home April 13, 1987, from Baif-Centreville for \$226,000, the whole as appears in Exhibit 4. The contract included Schedule "A" listing various features in the home to be acquired. In it the builder undertook to provide high quality carpet from vendor's samples.

On April 15, 1987, Mr. Rifai went to the builder's showroom and was shown samples of the rug to which he was entitled. From them, he selected the colour of his choice. The samples were of the rug type that was eventually installed and was 35 oz. weight.

He moved into the home November 20, 1987, and listed no complaints with respect to the carpet in the Certificate of Possession (Exhibit 6). He stated that the carpets looked fine at that time.

Approximately June 28, 1988, Mr. Rifai began to complain about the carpet both to the builder and eventually to the New Home Warranty Program. He testified that initially his complaint was only with respect to the carpet in his son's bedroom which was becoming worn out prematurely in an area near the side of his son's bed. His son was twelve year's old at the time.

In October 1988, he noticed a similar problem beginning to occur in the family room in an area beside which chairs were located. A representative of the builder visited Mr. Rifai's home and suggested that steam heating the carpet would solve the problem.

Mr. Rifai refused to do so. He was afraid that the steam cleaning might damage the rugs because of the chemicals used. As a result, he has never to this date cleaned the rugs.

After repeated complaints with respect to the carpet which were contested by the builder, Mr. Rifai made his claim with the New Home Warranty Program.

The New Home Warranty Program representatives came on several occasions to inspect and re-inspect and eventually denied Mr. Rifai's claim. Mr. Rifai testified that outside of the areas mentioned, there had been no complaints with the carpets in any other room or area of the home.

Mr. Rifai was the sole person to testify on behalf of the Applicant.

The New Home Warranty Program then presented its witnesses in defense to Mr. Rifai's claim. The first witness was Peter Bernard, an employee of Distinctive Broadloom and Interiors. His function was to inspect complaints on behalf of the company which supplies and installs broadloom in homes.

Mr. Bernard testified that his company had installed the carpets in Mr. Rifai's home and that they were 35 ounce weight carpet. He stated that there are many levels of quality in carpets and that the quality for a home type of Mr. Rifai would be considered high quality; in fact, it was the highest quality which could be provided where no upgrade is requested by a purchaser.

Mr. Bernard stated that he went to inspect the carpet at Mr. Rifai's home April 4, 1990. He found that the areas of the rug with problems in the family room were in the traffic areas in front of the two large chairs, the television and table. The problems complained of by Mr. Rifai were described by Mr. Bernard as being matting. When he backswept the rug, he noted that the fibre came back up in some areas, but not near the kitchen where the fibres appeared to be sticky. He believes that this was caused by a spill of some liquid because he felt stickiness on his right hand after he touched that area.

He testified that in his opinion, the carpet was not properly maintained; it was not sufficiently vacuumed.

He also visited the son's bedroom and saw similar matting beside the side of the bed where the son would get in and out of the bed.

Mr. Bernard stated that, in his opinion, there were no defects in the carpet and that the matting was the result of use as well as lack of maintenance. Shampooing would restore the natural fibres and colour, but matting could be expected to occur as normal wear and tear in any carpet.

In cross-examination, Mr. Bernard admitted that his company obtained 50% of its business from the builder and that there were some mutual ownership between the two companies.

The next witness was Mr. Mark Roccatagliata, a conciliator with the New Home Warranty Program. He testified that he has investigated at least 100 carpet complaints and that he inspected Mr. Rifai's home May 8, 1989. He saw considerable matting in the family room which he thought occurred through normal

wear and tear. He stated that the carpets were intact and had no defects. The wear and tear was in the traffic path in that room and was normal.

He saw similar matting near the side of the bed in the son's bedroom. He was of the opinion that the carpet was of high quality for a tract home of Mr. Rifai's type.

The final witness was Mr. Andy Richters, senior technical representative of the New Home Warranty Program. He went to inspect the carpets on September 20, 1989. He saw matting around the chairs and traffic areas in the family room and near the bed in the bedroom. His opinion was that the matting was the result of normal wear and tear and perhaps a lack of vacuuming. He saw no evidence of any defects and took photographs which this Tribunal has looked at carefully.

The Tribunal in looking at the photographs could not observe any blatant or apparent defects in the rugs.

In a claim for defect under section 13(1)(a)(i), the onus is on the owner to satisfy the Tribunal that a warranty has been breached (Levine, 12 CRAT 148). The Tribunal does not believe that Mr. Rifai has discharged this burden of proof and has not, therefore, proved the existence of a defect.

The New Home Warranty Program produced an expert, as well as two members of the Program with experience in dealing with rug complaints. All were categorical in stating that they could observe no defect in the rug, but rather that the problems complained of were either through normal wear and tear or lack of maintenance.

On the other hand, we have only Mr. Rifai's testimony to support the affirmation that there is a defect in the carpets. He brought no independent expert to establish his claim.

Therefore, the preponderance of evidence demonstrates that the problems complained of were not a defect, but rather matting taking place through normal wear and tear which is borne out by the fact that the matting exists in the areas with the highest traffic. It is also in the bedroom of Mr. Rifai's teenage son. A photograph of the bedroom shows many objects on the floor and raises the question of the maintenance of the carpet.

Under the circumstances, Mr. Rifai has failed to establish the existence of a defect in the carpets. The Tribunal finds that on the evidence presented, the problem in the rugs arose through normal wear and tear and/or from improper maintenance. As

a result, there is no right of warranty under Section 13(1) of the Act.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claim.



LAURENT AND IRENE ROBERGE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
WILLIAM WATSON, Member

APPEARANCES:

LAURENT ROBERGE, appearing on their behalf

NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 17 May 1990

Ottawa

REASONS FOR DECISION AND ORDER

Laurent and Irene Roberge were living near the Village of Casselman in Eastern Ontario and decided to move closer to the community centre. On June 30, 1988, they purchased a home as described in a letter of November 20, 1989 by their solicitor Mireille LaViolette to the Ontario New Home Warranty Program as follows:

We are the solicitors for Mr. and Mrs. Roberge who purchased the above noted property on June 30th, 1988 from Nation Investments Limited.

The said property was originally built and occupied by Robert Lorenzo Racine who was also a contractor carrying on business under the name "SABA".

Prior to closing the said transaction in 1988 I had explained the above situation to your people and was advised that since the home had been occupied by the vendor himself the Ontario New Home Warranty Act did not apply in this case (s.1(n)&s.6).

I have subsequently been advised by my clients that your office suggested that

the subject premises may in fact be covered by your program.

Our clients further advised us that the basement is leaking. We would appreciate receiving confirmation of the coverage of the subject property.

Should the premises be covered, kindly advise our office as to the procedure to be undertaken to remedy the situation.

We look forward to hearing from you.

The New Home Warranty Program's reply to Ms. LaViolette's letter was sent on December 19, 1989, and stated:

This will acknowledge receipt of your letter, dated November 20, 1989, concerning Lot 4, Plan 50M-80, the Roberge residence.

We have discovered that this home was enroled in June of 1986 by Mr. Racine. It appears that he enroled it because he anticipated selling it. However, in your letter, it appears that this was not the case and that Mr. Racine occupied the home. It also appears that, due to his bankruptcy, he lost the home to the mortgagee, Nation Investments Ltd., who, in turn, sold the home to your clients.

The Ontario New Home Warranties Plan Act, R.S.O. 1980, Chapter 350, pertains only to new homes and not to used or owner built, and previously occupied homes. Since this home was occupied by the builder himself, the warranty is not applicable. We are therefore proceeding to cancel the enrolment.

If you have further queries, please feel free to contact the writer.

Mr. Roberge told the Tribunal that he had requested a hearing to review this decision on January 9, 1990. He said that he had been assured of New Home Warranty coverage for this property as a new home by Percy Racine, the owner of the vendor corporation

and by the realtor involved in the transfer. When he went with his wife to sign certain documents for the purchase, he asked about a warranty on the house and the registration number and was told that no warranty would be forthcoming.

This is confirmed by his own letter of appeal to this Tribunal which stated:

We were advised by the Realtor, in response to one of our many queries, that the subject property, was indeed enroled under the Ontario New Home Warranty Program, was an important factor to us in deciding to purchase. We had also been advised that while the house was some two years old or so, it was new and had never been occupied.

While signing documents at the lawyer's office, however, we were informed only a few days before the closing date (June 30, 1988) that the Warranty Program may not apply as the house, while still listed for sale, had been occupied by the builder for several winter months rent free as the builder had declared bankruptcy, had no money and no place to live.

In the second year of our residency, we had excessive rain last fall in a short period of time which caused water to leak into the basement.

When we tried to place a claim under the Warranty Program, the foregoing information was then uncovered.

It appears that when we purchased this new house the principals were also unaware that the Ontario New Home Warranty Program would not apply or be cancelled in December 1989.

As consumers we are again the innocent victims of bureaucracy and are being penalized for something we had nothing to do with or could not control.

We have attached herewith copies of letters from our solicitor and from the Ontario New Home Warranty Program for your perusal.

In view of the foregoing we ask that the Warranty Program be reinstated in our favour.

Mr. Roberge agreed that he knew as of the closing date that the home which had stood vacant for about two years may not be covered by the Plan, but he and his wife went ahead with the purchase since their own home had been sold and they had to have a home in which to live.

Water damage and leaks occurred in the late fall of 1989, and any claim for these damages is now rejected by the Plan as set out above.

Mr. Roberge stated that the builder, Robert Racine had stayed in the home over the winter of 1985 - 1986, just to finish off the interior since he was "bankrupt" or at least insolvent and had nowhere else to stay.

Mr. Roberge did not call either Percy Racine or Robert Racine, nor his real estate agent to give any evidence as to what he had been told or relied on in this claim. No search of title was shown to the Tribunal, and there was no clear explanation as to how Percy Racine became the vendor through Nation Investments Limited although Mr. Roberge suggested that the builder Robert Racine owed Percy Racine monies for building materials, and that title to the property may have passed to cover those obligations.

Robert Reid is the Manager for Eastern Ontario under the New Home Warranty Plan. He confirmed the letter above sent to Ms. LaViolette by his Assistant Manager, Philip Mayhew and noted that the house was enrolled in the Plan in June 1986 after its completion by Robert L. Racine, who was then a registered builder with the Plan. He admitted that the Plan does not inspect each property where some 1,800 builders in his area have some 7,000 units under construction in a year, and that registration can occur after completion even though this may well be a clear violation of Section 12 of the Act.

The enrolment of this home in the Plan was cancelled after the letter had been received from Ms. LaViolette and cancellation was based on the use of the word "occupied" in that letter.

The words "owner" and "vendor" as defined in Section 1(g) and 1(n) as:

- (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title,
- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

On the evidence before the Tribunal, we find that this home was "previously occupied" so that any claim by these owners, Mr. and Mrs. Roberge cannot be maintained against the Plan. Since Mr. and Mrs. Roberge by their own letter acknowledged that they were aware of a possible lack of coverage by the Plan before they completed the closing of the purchase, they knowingly ran the risk of lack of coverage. If they were misled by others as to that coverage, they may well have remedies against those persons.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.



LEO ROSSETTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
LOUIS A. RICE, Member

APPEARANCES:

LEO ROSSETTO, appearing on his own behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF 27 March 1990

HEARING: 17 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Leo Rossetto from the Proposal of the Ontario New Home Warranty Program Registrar not to renew Mr. Rossetto's registration as a builder under the Ontario New Home Warranties Plan Act.

The evidence was clear that there was not clear communication from the builder to the Program during the course of the review of the homeowner's claim, conciliation and subsequent events dealing with repairs and corrections.

In his evidence before the Tribunal, Mr. Rossetto maintained that he had endeavoured to effect repairs where possible for the homeowner, that he was working in the area and, in fact, sent his sub-trades to take corrective action. He also indicated that he had objected to a number of issues considered by the Program in its conciliation report, and that he had raised these issues orally with the Program's Regional Manager. He did admit that there were some items covered under the warranty that he did not do either because he was unwilling to do so or he determined that they could not be done.

On the basis of his own evidence, therefore, it is clear to the Tribunal that there was some obligation on Mr. Rossetto to either correct the work or contribute to a settlement with the homeowner and failure to do so would permit the Program to deny renewal except on certain financial terms.

These terms the Program has set at \$4,140 being the amount of the cash settlement with the homeowner of \$3,600, plus an administration charge of 15% amounting to a further \$540. This settlement was based upon estimates provided on a Work Schedule based upon the Conciliation report of warranted items.

On the evidence before it, however, the Tribunal is not totally satisfied that the homeowners should have been compensated for all of the items set out on the Work Schedule. Of the ten items identified on the Work Schedule, the following items were clearly compensable:

Item 1 referred to metal doors which the builder stated could be planed no further and which doors may have been installed out of plumb.

Item 2, being a squeaky and uneven front hallway the builder admitted he had not fixed and stated in fact, it could not be corrected.

Item 3 consisted of a number of drywall imperfections, cracks, loose tape and voids in walls. In the view of the Tribunal, while many of these items were minor, they are indicative of sloppy work which could have and should have been corrected by the builder.

Item 4 related to cracking in the outside porch. The builder indicated that repairs would be unsightly.

Item 7 related to concrete foundation walls. Again, it is the view of the Tribunal that remedial work should have been done by the builder.

The value of these items based upon the Work Schedule introduced in evidence totalled \$2,825.00.

The balance of the items in the Work Schedule are in the opinion of the Tribunal questionable. Item 5 is identified as the repair and refastening of the aluminum soffit near the centre of the upper roof. Evidence was given that no visual inspection of this item was made by the Program's conciliation inspector. In view of the builder's assertion that this had been repaired prior to the conciliation and that he had so reported it to the Program, the Tribunal cannot find that this is an item for which compensation should have been given to the homeowners.

Item 6 was the elimination of voids in mortar joints at the time of the conciliation. Item 8 related to regrading and the supply of a basement window sill. The builder's evidence was that

the base of the window was 16 inches above grade and that this had been identified as such on the conciliation and therefore, no window well is required. Item 9 identified a water leak above the dining room ceiling. The builder gave evidence that a water vent had caused this problem, but that this had been corrected by his roofer several months earlier.

On the basis of the evidence the Tribunal is not satisfied that these items should have required compensation and in view of the objections made by the builder at the time of the conciliation, the Program should have made some adjustment in its settlement offer. The value of these items amounts to \$775.00.

Having considered all of these matters relating to the settlement with the homeowners, as well as the lack of written response and prompt action by the builder, the Tribunal is of the opinion that the builder has an obligation to compensate the Program with respect to the items which the Tribunal finds to have been properly compensated in the amount of \$2,825.00 plus a 15% administration fee of \$423.00 for a total of \$3,248.00.

By virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to renew the registration of Leo Rossetto if Leo Rossetto pays to the Program the sum of \$3,248.00, failing which the Registrar may carry out his Proposal to refuse renewal of registration.

M. SETH

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
D.H. MACFARLANE, Member

APPEARANCES:

M. SETH, appearing on his own behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 11 September 1990

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has considered the motion that has been brought by Ms. Street on behalf of the Program and there are a few things we have to explain, particularly to you Mr. Seth.

You have certain rights pursuant to your contract with the builder and those rights are pursuable by you in the civil courts. The appeal of the decision under the Ontario New Home Warranties Plan Act is a different matter and the appeal that we are hearing today deals simply with your claim against the Program. It does not in any way affect a claim which you might otherwise have against the builder.

That being said, in dealing with the Program, we are faced with the motion that has been brought by Ms. Street that you executed a full and final Release under date of October 2, 1989 as it pertains to the Program. That Release is clear and unequivocal in its wording. It identifies the Applicant Matash Seth, and says:

In consideration of the payment or promise of payment of the sum of \$1000, I hereby release and forever discharge the Ontario New Home Warranty Program from any and all actions, causes of actions, claims, demands, damages or loss, however arising, which have been sustained in consequence

of all conciliation reports dated October 28, 1988 including the following items...

Now although there are following items enunciated, the Release is very clear on its face that it is a full and final Release of the Program from all matters arising out of the conciliation reports dated October 28, 1988. In those reports, there were Items A(1) being allowable claims, and Items A(2) being claims which the Program found to be not satisfactory.

In argument, Mr. Seth has acknowledged that he knew he was signing a Release. He indicates, however, that he thought it pertained only to the A(1) items. It is unfortunate that there was no reference in writing, either in this document or by any accompanying documents from Mr. Seth, identifying that belief. The Tribunal, therefore, has no alternative but to accept what is the clear, unambiguous Release, and there cannot be permitted any parole evidence to deal with the matter of what is contained in the Release or what was the thought that went behind it.

There has been suggested by the Tribunal the possibility that an argument might be put forward by Mr. Seth that it was not his act - the document that he signed was not what he thought it to be. But in his argument before the Tribunal as I have stated, Mr. Seth clearly indicated that he knew it was a Release; it simply was a mistake in his testimony to us, that in his view, it only pertained to A(1).

Taken with the letter of July 20, 1989, which Mr. Seth acknowledged having received, where the builder was putting forward a settlement offer of \$1,000 to cover A(1) and A(2), the letter of September 25 from the Program, dealing with an identical settlement amount and the Release which, in fact, was executed by Mr. Seth, the Tribunal has no choice but to accede to the argument of Ms. Street, that a full and final Release against the Program has been executed by Mr. Seth and that this application therefore, by way of appeal, must be dismissed.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.



LOU MORIN AND SYBIL SHAVER

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
WILLIAM WATSON, Member

APPEARANCES:

J. PAYNE, representing the Applicant

NETANUS T. RUTHERFORD, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 17 May 1990

Ottawa

REASONS FOR DECISION AND ORDER

Five joint-venture partners built a 65-unit condominium at 2019 Carling Avenue in Ottawa, Ontario. One of the partners was Twenty-Nineteen Carling Terrace Ltd. which owned the parcel of land on which the building was constructed. The declaration and description of the project was registered on April 29, 1985, as Carleton Condominium Corporation No. 283. On June 28, 1985, Twenty-Nineteen Carling Terrace Ltd. transferred five completed units to each of the other four partners. One of those was Peirvest Inc., and the equity above the mortgage on each unit was the share of profit for each of the partners. Peirvest Inc. received title to Unit 209 and transferred title to that unit to Lou Morin and Sybil Shaver on October 17, 1986. A Notice of a claim by Morin and Shaver was given to the Ontario New Home Warranty Program by letter dated August 10, 1987.

The Tribunal is asked to decide whether the Warranty under Section 13 of the Ontario New Home Warranties Plan Act expired on June 28, 1986 or on October 17, 1987. If the latter date applies, then the claim by the Applicants is within one year, and after an examination of the premises, the Program would consider the various alleged deficiencies and decide if they were particular to the unit or part of the common elements.

Lucien (Lou) Morin gave evidence that he and his spouse first saw the unit August 1986. They bought it and moved in on November 7. He stated that the unit was brand new and had never

been occupied by anyone else. The appliances were there with their packing and the cupboard doors were taped, and there was nothing in the unit except for some dust.

A statutory declaration was received by Morin and Shaver from Peirvest Inc. that no tenant had rented the unit.

On Morin's instructions, a letter was sent by solicitors on August 10, 1987, setting out their claim as first occupants under the Warranty Plan concerning certain deficiencies.

To Morin, "occupied" means "living there", and "possession" means "when he and his spouse moved in".

Lorne Davis lives across the hall in Unit 208 and has done so since December 14, 1984. He was President of the Board of Directors of the C.C.C. No. 283 from turnover until April 1988. By his lists, the unit was vacant until Morin and Shaver moved in. By his evidence, he is retired, was in the building except for holiday week-ends and maintained the Notice Board at the entrance to the building so that he knew of the occupancy status of Unit 209.

Kenneth Cramer, an Ottawa lawyer, gave evidence as one of three partners in Peirvest Inc. The other four units received as a share of the proceeds of the joint venture were all rented before eventual sale, but Unit 209 was not occupied before Morin and Shaver took possession; although it had been shown from time to time to possible purchasers or renters. Cramer agreed that the keys to the unit were held and that Peirvest Inc. had control over the unit. The unit had been inspected visually for any cosmetic defects by Cramer when transfer of title took place in June 1985.

John Reid is the Regional Manager for Eastern Ontario of the Ontario New Home Warranty Program and stated that the records of the Plan show the possession date as June 28, 1985, so that the complaints of Morin and Shaver were said to be out of the warranty year. The vendor/builder was noted as Twenty-Nineteen Carling Terrace Ltd. and the unit was enrolled in the Plan on March 19, 1984. In the opinion of the Program as written to Morin's solicitors, Mr. Reid wrote:

...Mr. Morin and Ms. Shaver purchased the above noted unit from Peirvest Inc., who had previously acquired title from the vendor, 2019 Carling Terrace Ltd. When Peirvest Inc. acquired title, a Certificate of Completion and Possession was executed on June 28, 1985, as required under Section

13(3) of the Ontario New Home Warranties Plan Act R.S.O. 1980, c.350, and the warranty commenced on that date. The vendor's one year warranty therefore expired on June 28, 1986. Peirvest Inc. was not a registered vendor and did not require registration, but rather was an owner disposing of an asset. Your clients are therefore successors in title and eligible for the remaining portion of the warranty.

The fact that Peirvest Inc. did not occupy the unit, does not mean they did not acquire it for occupancy by someone else. The Act does not state that occupancy must be by the person who acquires the home from a vendor.

The Program's copy of the Certificate of Completion was destroyed when the records entry was made. Current practice is to keep such items on a permanent file.

Counsel for the Applicants referred the Tribunal to the definitions of owner and vendor in the Ontario New Home Warranties Plan Act, Section 1:

- (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title,
- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

In her opinion, Morin and Shaver took the property "for occupancy" and Peirvest Inc. sold to them a home "not previously occupied". The conveyance to Peirvest Inc. is seen as a distribution to a joint-venture partner in order to eventually sell the unit to an owner and only when an owner lives in the unit can any deficiencies be clearly known. She asserted that Morin and Shaver as new buyers are exactly the persons who are meant to be protected by the Act under Section 13. Peirvest Inc. was not registered as a vendor or as a builder under Section 6 of the Act.

The following excerpt from Royal Trust Corporation of Canada (1985) CRAT 146 is of assistance to this Tribunal where it states at p.149:

The Tribunal is of the opinion that each claim should be considered on its merits and if a major structural defect is proved and damage has resulted, then it is the intent of the legislation to protect all persons who first acquire the home for occupancy and all successors in title.

Counsel for the Program stressed the word "completed" in reviewing Section 13(3) of the Act which states:

The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for his possession and the warranties take effect from the date specified in the certificate.

The information could not, in her view, be in the Program's computer unless a Certificate had been completed. Mr. Cramer admitted completing some forms and doing an inspection for cosmetic items, but did not produce any copy of a Certificate which would show Peirvest Inc. either as owner or as vendor.

In her view, since the unit was completed substantially at the least, there is no further requirement for any physical occupancy in the word "possession" which Peirvest Inc. had either actually or constructively. In addition, the unit stood vacant for more than two years and the Act should apply to new freshly completed properties. The unit was enrolled in the Plan, but the Applicants knew they were in fact buying a two year old unit so their claims are really an attempt to extend the warranty obligations beyond a reasonable time.

The Ontario New Home Warranties Plan Act is remedial, consumer protection legislation and should be liberally construed, as was suggested by Mr. Justice R.E. Holland in the Meadows of White Oaks II Ltd. case, reported at 65 O.R. (2d) at p.365.

Accordingly, this Tribunal concludes that the Applicants are the first occupants of the unit and should be in equity protected in their claims under the Act. Since their notice to the Plan was within one year of their acquisition of the unit, the Tribunal directs that the Program inspect the unit and decide upon the merits of the various claims made by Morin and Shaver.

MR. AND MRS. GAI SINGH

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
LOUIS A. RICE, Member

APPEARANCES:

MICHAEL V. MACKAY, representing the Applicants

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 18 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered March 20, 1990, disallowing the claim by Mr. and Mrs. Gai Singh. The claim was for the return of their deposit of \$20,000 due to the builder's breach of contract, the whole pursuant to Regulation 728, section 12. The New Home Warranty Program decided that Mr. and Mrs. Singh had failed to prove that the delay in the closing was extended beyond the 120 day limit without their consent.

Mr. and Mrs. Singh argue that they are entitled to the reimbursement of their deposit because they never consented to the extension of the delay of 120 days for the delivery of their home; therefore, by the terms of the Regulations, they are entitled to a refund of their deposit because the builder failed to deliver within that period.

This Tribunal must decide whether or not the buyers agreed to the extension of the closing date beyond the delay of 120 days.

Mrs. Singh, the wife of Mr. Singh, and one of the purchasers, was the first to testify. She was a woman with a good education and of considerable intelligence.



She testified that in March 1989, she and her husband sold their original town home, with a closing date of July 31, 1989. Thereafter, on April 9, 1989, she and her husband bought from Beaverbrook Estates Inc. a lot upon which a home was to be built, with a closing date of September 15, 1989 (Exhibit 4). They had asked for a closing date of July 31, 1989 to coincide with that for the sale of their townhouse, but were told that the earliest would be September 15, 1989.

At the time, Mrs. Singh was pregnant and expected her baby in December 1989; she, therefore, wanted to take possession of the family home as soon as possible.

Mrs. Singh testified that she and her husband, throughout the months of May and June 1989, checked on the progress of the construction and were concerned when by July 7, 1989, they noticed that no construction had begun.

On July 11, 1989, the Singhs received a letter from Beaverbrook (Exhibit 8) in which they were informed of delays in the issuance of Building Permits for the construction of their home and that, as a result, the closing date would be delayed approximately three months. This threw them into consternation since this delay would result in a closing in December 1989, the exact time when Mrs. Singh was to deliver her child.

On that same day, she called Star Probe to see if they would intervene; she wanted to put an end to the purchase contract and to be refunded the deposit of \$20,000 which had been made by them to the builder. As per her notes (Exhibit 7), she was referred to the New Home Warranty Program where she spoke to Messrs. Barry J. Rose and Mr. Wheaton.

She asked them specifically about trying to terminate her contract and getting a refund of the deposit. She then received a detailed explanation of the provisions with respect to the operation of the 120 days in extensions. She was told it was only in the case of a home's closing date being in excess of 120 days after the closing date fixed in the contract, that she would be entitled to put an end to the contract and have her deposit returned.

It is clear from the notes that Mrs. Singh made in Exhibit 7, as well as from her testimony, that her major concern July 12, and from that time on, was to find a way to cancel the purchase contract and obtain reimbursement of the deposit of \$20,000. In fact, in her testimony, Mrs. Singh spoke of many phone calls thereafter to the New Home Warranty Program always dealing with when she could claim the deposit. It is abundantly clear from

her testimony that there was no longer any intention to proceed with the purchase of the home if any way could be found to rescind the contract.

She testified that on July 24, 1989, she spoke to Ms. Faith Taylor, an employee of the builder, and asked for her deposit back. She was refused categorically and told that other buyers were in the same position as she was; that is, having to wait an extra 120 days for closing because of problems in getting approval of Permits from the City of Mississauga.

After speaking to Ms. Taylor, Mrs. Singh testified that she and her husband attempted to rent a unit from a building where they had previously leased, but were unable to do so. They then decided to buy another home, despite having already contracted to buy the Beaverbrook home.

They bought the second home August 26, 1989 and took possession of it on September 15, 1989. They did not at that time, nor did they ever, inform Beaverbrook of the purchase of this home.

Mrs. Singh testified that she hoped to be able to sell the Beaverbrook home once closing took place because the market was at that point "a very hot one" for homes. She hoped even more that Beaverbrook would not be able to close within the 120 day extension period so she could demand back her deposit and put an end to the contract.

She stated that sometime after September 21, 1989, she received a further letter from Beaverbrook Estates Inc. (Exhibit 9) dated September 21, 1989 informing her and her husband that the delay for closing had been extended again, this time until March 28, 1990. Mrs. Singh realized that this constituted a breach of the 120 day extension rule and phoned her lawyer for further guidance. She was told that at the end of the 120 day period, she had 10 days to ask the builder for her deposit back.

Mrs. Singh testified that sometime during October 1989, she was phoned by Ms. Taylor of Beaverbrook Estates Inc. with respect to the September 21, 1989 notice of extension. Mrs. Singh stated that when asked whether there was any problem with this extension taking place, she said "No".

In cross-examination, Mrs. Singh stated that she had never told the builder that she had moved into a new home or even that she had changed address.

She also stated that after speaking to Mr. Wheaton as early as July 12, 1989, she knew that the 120 day extension would bring the closing to some time in January 1990.

She testified that the home that she bought in August 1989 was 400 square feet larger than the Beaverbrook home and had one extra bedroom. The home cost approximately \$8,000 more and she said that she liked it better than the Beaverbrook house.

Mrs. Singh said that she was hopeful the builder would not complete the home within the 120 day extension delay because this would allow her to cancel the contract and obtain reimbursement of her deposit. She was, therefore, relieved when she received the letter of September 21, 1989, announcing that the home would not be completed before March 28, 1990, since this brought it beyond the 120 day delay.

On January 19, 1990, pursuant to the instructions of Mr. Singh, their lawyer sent a notice (Exhibit 11) informing Beaverbrook Estates Inc. that they were exercising their right of termination as provided in the Addendum to the contract of sale and asking for reimbursement of their \$20,000 deposit. It is to be noted that in the letter, their lawyer speaks of the considerable hardship caused to the Singhs by the delays in closing because they were "without accommodation since the middle of September, 1989". This, of course, was patently false since the Singhs had purchased the second home in August and had taken possession September 15, 1989.

The statement could only mislead Beaverbrook Estates Inc. Moreover, since their lawyer had also prepared the closing documents for the purchase of the second home, he was very well aware that from the middle of September onward, the Singhs had accommodation.

It is very important to note that again in cross-examination, Mrs. Singh admits that she told Faith Taylor that there was no problem with the closing date of March 28, 1990.

Mrs. Singh had a final conversation with Ms. Taylor some time in the second half of January 1990. Ms. Taylor was angry about the letter of January 19, 1990 asking reimbursement of the deposit and told her that the builder would not agree to it.

The next witness, Mr. Gai Singh, a highly educated individual, corroborated the testimony of his wife as to the failure to carry on construction during the spring and summer months of 1989.

He stated that the couple bought the second home with the idea of either selling the Beaverbrook home or getting the deposit back from Beaverbrook if they went beyond the 120 day delay. He did not try to find a buyer for the Beaverbrook home. He denied ever asking Beaverbrook Estates Inc. to extend the closing date to March 28, 1990.

In cross-examination, Mr. Singh admitted that it weighed heavily on his mind that he had bought two homes at the same time. He, therefore, wanted Beaverbrook to breach the contract by going beyond the 120 day extension. This would solve all his problems.

Ms. Faith Taylor, Sales Manager for Beaverbrook, testified that Beaverbrook only applied for a Permit after the Singhs had chosen a floor plan, since it was only at that point that a permit could be sought.

She stated that the first occupancy in the project as a whole was August 16, 1989 and that the first occupancy on Longspur Road, the street on which the Singhs home was to be built, was on February 14, 1990.

She corroborated the phone call of Mrs. Singh on July 24, 1989 and her refusal to allow them to withdraw from the sale because the builder was within the delays stipulated in the New Home Warranty Program.

Ms. Taylor testified that on August 4, 1989, she spoke to Mr. Singh and wrote a note summarizing the phone call, which was produced as Schedule "C" of Exhibit 13. According to the note and the testimony of Mrs. Taylor, Mr. Singh sought a delay in the closing from December 1989 to March 1990 because he and his wife were expecting a baby in the month of December. She stated that the home could have been ready for occupation within the 120 day period, but that Beaverbrook agreed to the extension anyway.

She said that the company can and does build homes in as little as ten to twelve weeks from permit approval which, in the case of the Singhs, was received September 15, 1989. As a result, the Singh home could have been delivered between the 15 of December 1989 and the 13 January 1990.

Ms. Taylor stated that she was shocked when the Singhs sent their notice January 19, 1990, and that the company refused to cancel the sale because it was the Singhs who had first asked for an extension. In cases where the builder was in breach of the 120 day extension, it voluntarily refunded the deposit and had done so in the sale of Lot 587, the home adjacent to the Singhs'.



In cross-examination, she spoke of certain lot sales which took place after the Singhs, but where the closing took place one month before the date fixed for the Singhs. This demonstrated that in the absence of the agreement with the Singhs for the March 28 delivery, their home could have been finished earlier.

Ms. Taylor agreed that the extension agreed to should have been reflected in an amended agreement or a specific letter, and that it was sloppy of the builder to not have done so.

The final witness was Mr. Steve Wheaton, the Manager of the Brampton Regional office of the New Home Warranty Program. He stated that he had spoken to Mrs. Singh in July 1989 on how the 120 day extension rule functioned and spoke to her again after they had filed their claim with the New Home Warranty Program.

He testified that the New Home Warranty Program had no other claims with respect to Beaverbrook. The New Home Warranty Program denied the claim because it was unclear as to whose testimony was to be believed and the New Home Warranty Program did not believe that the builder was in breach of its obligation.

After cross-examination, Mr. Wheaton stated that he believed that Mr. Singh had asked for an extension from Ms. Taylor because it would bring the builder beyond the 120 day limit. This would allow them to terminate the contract.

In argument, the lawyer for Mr. and Mrs. Singh agreed that the builder could have constructed the home within the period of 120 days if it was set on doing so. He stated that his clients were gambling that the builder would choose not to do so and thereby go beyond the 120 day extension.

He further argued that because the 120 day period was breached and his clients had not consented to an extension, that they were entitled to seek the termination of the contract and reimbursement of their deposit.

The issue to be resolved by this Tribunal is the application of Section 5(iii) of the Addendum to Agreement of Purchase and Sale whose inclusion and wording are mandated by Regulation 728 of the Act.

Section 5(iii) reads as follows:

If the closing date in the Agreement has been extended for 120 days and the Vendor still requires further time for construction of the dwelling, unless



subsequent to the closing date in the Agreement the parties otherwise agree, the Purchaser may terminate the Agreement within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice in writing to the vendor...

The Section, therefore, gives an absolute right to the purchaser to terminate a purchase agreement under the following circumstances:

1. The builder goes beyond the 120 day extension subsequent to closing date.
2. The purchaser sends a notice seeking termination within 10 days after the 120 period has elapsed.
3. The notice of termination must be in writing.

Section 5(iii) also stipulates one exclusion to the exercise of this right by the purchaser. If, subsequent to the closing date, the purchaser agrees to an extension beyond the 120 days, he may not terminate the agreement. It is to be noted that the agreement by the purchaser to an extension is not required to be in writing. It can, therefore, be done orally.

The Tribunal believes that the case of Mr. and Mrs. Singh turns on whether they consented to the extension of the closing date beyond the 120 day period. Whether it was the vendor or the purchaser who sought it, is not material; all that matters is whether the purchasers, in fact, agreed it.

To decide whether consent was given or not, the Tribunal need look no further than the evidence given by Mrs. Singh herself. She stated both to her own lawyer and in cross-examination, that she was called by Beaverbrook employee Faith Taylor and asked specifically whether there was any problem with the closing being extended to March 28, 1990. In response, she answered simply "No".

The answer by Mrs. Singh was not true and was very misleading. As she testified, she was seeking to terminate her contract with Beaverbrook and was counting on the builder not building within the 120 day delay extension in order to do so. For this reason, there obviously was a problem with extending the closing since she intended to terminate the contract if the builder did not close before the expiration of the 120 days.

What would the builder reasonably conclude from her answer that there was no problem? Simply that they could close March 28, 1990, after the extension of 120 days without any problem. From the builder's point of view, the buyer obviously consented to the delay, because otherwise, there would be a "problem".

Mrs. Singh knew or should have known that her untruthful answer would mislead the builder. Had she refused to answer the builder, or had said there was a problem, the builder would not have been led into believing it could go beyond the 120 day delay. The builder would then have known that it was exposing itself to risk if it went beyond the 120 day extension. It is in evidence that in that event, it could have built the property within the 120 day delay, if it chose to do so.

Under the circumstances, the answer of no problem to the extensions constituted agreement by the Singhs to the extension beyond 120 days and to acceptance of the closing date of March 28, 1990. In essence, by saying there was no problem, Mrs. Singh was by implication saying yes to the extension.

She must have known or should have known that in giving that answer, the builder would believe that the closing date of March 28, 1990 was acceptable and had been accepted.

Had Mrs. Singh not answered as she did and simply waited for the 120 day delay to expire, she would have been entitled to claim the deposit.

The Tribunal also believes that there is a further ground for refusing the Singh's claim: Estoppel. Because Mrs. Singh misled the builder into believing the delay to close had been extended to March 28, 1990, the Singhs are estopped from invoking the passing of the 120 day delay as a ground for terminating the contract. It has been proved that the home was completed by March 28, 1990.

The Tribunal believes that Mr. Singh played a role in creating the mistaken belief by the builder that the March 28 closing date was acceptable. The notes of Ms. Taylor indicate that Mr. Singh asked for an extension. Mr. Singh himself has testified that he at no time informed the builder of his purchase of a second home or of his desire that the builder fail in meeting the delays.

While it is not clear because of the contradictory testimony, whether Mr. Singh did, in fact, ask for an extension, it is completely consistent to believe that he would have done

nothing to make the builder aware that it was at risk if it did not meet the 120 day limit.

Under the circumstances, the Tribunal believes that the Singhs are not entitled to the reimbursement of their deposit.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. R. SINSON

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member  
JOHN HURLBURT, Member

APPEARANCES:

MR. AND MRS. SINSON, appearing on their own behalf

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 21, 27 September 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program to disallow certain claims of Mr. and Mrs. Sinson. The decision was dated March 20, 1990. The Applicants alleged that they were entitled to receive laundry upper cabinets, a vegetable spray and a cold cellar by virtue of their purchase contract with the vendor, but that the vendor had failed to provide these items.

In the case of the vegetable spray, the Applicants claimed that they received a substitution of lesser quality than the item referred to in the Agreement of sale.

The uncontested facts of the case are as follows:

On July 15, the Applicants entered into a purchase of a home with a numbered company, 724848 Ontario Inc., to purchase a lot on which was to be built a home called as the "Surrey". Completion was to be on February 21, 1989.

Exhibit 11 included all documentation with respect to the purchase of the home. It contained the Agreement of Purchase, together with a floor plan for the main and top floor. It is to be noted that no floor plan of the basement was given. It also included Schedule "A", a list of luxury features, and Schedule "C", which set out certain items which the vendor agreed to provide as part of the purchase price.

In Section 3 of Schedule "A" dealing with the kitchens, the first clause states that the vendor will provide "Double stainless sinks, with vegetable spray faucet attachment". That is, the vendor agreed to provide an item designated as a vegetable spray which was to be an attachment to the faucet of the double stainless sink.

Schedule "A" makes no reference to the laundry room except to stipulate that textured ceilings will not be provided in laundry areas.

Schedule "A" makes only one reference to the basement and that is in part 7 where basement areas are excluded from receiving quality luxurious broadloom.

Schedule "A" has, as its purpose, the listing by area of all of the features that the buyer is to receive. They are clearly set out.

In addition, the floor plans give additional information as to what is included in the home. The plan of the main floor shows a kitchen through which there is a broken line running from the refrigerator through to the sink to the very end of the kitchen. There is no such broken line in the plan of the laundry room.

The Tribunal finds that the agreement provided as Exhibit 11, together with its Schedules and floor plans, constitutes the entire undertaking of the vendor of the home he was to deliver to the Applicants. The Applicant can rely only on Exhibit 11 in determining what items they were to receive. In interpreting Exhibit 11, the Applicant are entitled to rely on any collateral or subsequent documents which shed light on what they were to receive.

At the outset of the hearing, the New Home Warranty Program asked that the builder be impleaded as a party to the proceedings in as much as the hearing involved the interpretation of the sales contract. The Tribunal granted the motion and impleaded the builder as a party to the hearings.

The first witness to testify on behalf of the Applicants was Ms. Ethel Joe, who purchased a home from the builder in the same subdivision; viz. the "McDouth" model.

She testified that she spoke to one Mr. Klim, a representative of the builder, in May 1988, about laundry cupboards and was told that they would be a standard item in the home.



In October 1988, she had a meeting with Mary Sirota, a representative of the builder, to choose colours and samples for the entire house as well as optional upgrades. At that time, a form was filled in entitled "Scarborough Heights Colour Selection Sheet." The form with respect to the Applicants' home has been filed as Exhibit 12(a) and 12(b).

In the section called "Cabinets & Counter Tops", the last item is entitled "Laundry Uppers". At that time, Mary Sirota filled in the colour that the Laundry Uppers were to be, as well as all the other items in that section. It is to be noted that all of the areas of the home were set out individually, together with the paint colour for each such area.

Ms. Joe testified that a couple of days before closing she was informed by Mr. Kowinski, a representative of the builder, that she would not receive upper cupboards in the laundry room despite its having been listed on the Colour Selection Sheet.

Mr. Kowinski said that Mary Sirota had erred in including that item since no Laundry Uppers were to be provided in her home. He said that nowhere in any of the contracts or schedules was it stipulated that the buyer would be entitled to Laundry Uppers.

Ms. Joe also stated that she had visited the trailer in which samples of what was to be provided in the home (such as tiles, cabinet doors, etc.) were on display. At that time, she saw a vegetable spray which she identified as being similar to one in an exhibit produced as Exhibit 6. In Exhibit 6 under the heading "All-in-One Kitchen Faucet", there is to the right of the faucet a black item which is not attached to the faucet, but rather to the bar, and which has its own connection to the water pipe; it is called a spray. She said that she was told that would receive this spray in her home.

When she took possession of her home, she found that the builder had not provided Laundry Uppers, and the vegetable spray. Instead, she received a device which was attached to the kitchen faucet and which the builder claimed was the spray attachment to which she was entitled. The item was a swivel aerator, similar to the final panel illustration in Exhibit 6. Ms. Joe believed that the aerator was not a vegetable spray and, therefore, constituted an illegal substitution of the item promised by the builder. She informed the Tribunal that while the aerator sprayed water, it could not be directed in a manner which she found satisfactory.

In cross-examination by the attorney for the Ontario New Home Warranty Program, Ms. Joe stated that her complaints with respect to the vegetable spray and laundry uppers, were not listed on the Certificate of Completion and Possession. She also did not know on which side of the faucet it was to be and was unable to give specific information on it.

The next witness to testify was Junior Ward who bought the "Winston" model home on May 13, 1988, located in the same subdivision as the Applicants' home.

He said he first the basement plans in August 1988 when he selected colours with Ms. Sirota. In those plans, he saw a cold cellar. The builder had submitted these plans to the City of Scarborough as the plans for all the basements in the subdivision.

Mr. Ward admitted that at the time of the Offer, nothing was said about a cold cellar. He was not offered one, nor did he ask for one.

Before closing in February 1989, Mr. Ward inspected the basement and noticed that there was no cold cellar. He asked Mr. Kowinski about this and was told that a cold cellar did not come with the house. Another representative of the builder, Mr. Herzog, told him the same thing. He eventually paid \$500.00 to open up the part of the basement where the cold cellar was indicated in the plans and put in an entrance. The area contained no vent.

In cross-examination, Mr. Ward stated that he had never been given a floor plan of the basement and only saw such plans months after he had entered into the purchase of the home. He also stated that he had had a cold cellar in his previous home.

The next witness was Ravi Bedi, who purchased a similar model "Surrey" home from the builder on May 17, 1988. He said that he had asked Mr. Klim, a representative of the builder about the vegetable spray and was told that it was an extension type on a hose. He was not shown a model of the vegetable spray because it was a standard item. He never received either an aerator or a vegetable spray as he understood it to be. In any case, he did not consider an aerator to be a vegetable spray since it was not on a hose.

Like previous buyers, he also was asked to choose colours for Laundry Uppers by Mary Sirota. His home, however, was delivered without laundry cupboards.

Finally with respect to the cold cellar, he testified that some buyers of the "Surrey" model got one at no extra cost. He also stated that he never, at any point, discussed receiving a

cold cellar when he negotiated the purchase of the home. As with Mr. Sinson, he received floor plans for the main floor and the top floor, but no floor plan for the basement.

In cross-examination, he stated that he did not know if other buyers had paid the same base price for the "Surrey" model home with a cold cellar.

The next witness, Steve Khlaif, a buyer of a home in the same subdivision, corroborated the previous testimony and added that he had seen a hose spray in the display trailer of the builder which was the vegetable spray that was to be included.

In cross-examination, with respect to the vegetable spray, he was unable to state the colour of the vegetable spray or which side of the sink it was on.

One Mr. Pascual then stated to the Tribunal that if he were to testify, he would corroborate the testimony of previous witnesses with respect to the vegetable spray and laundry room cupboards.

Mr. Sinson was the final witness on behalf of the Applicants. He stated that he met Mr. Klim, representative of the builder, on approximately July 9, 1988. He asked about the standard items for the "Surrey" model and was shown the list of features (Exhibit 7). At the same time, he was shown samples of cupboard doors for the kitchen, of bricks, tiles, rugs, and of the kitchen sink. The cupboard doors for the laundry room were the same as those for the kitchen.

He went on to testify that at the same time he saw the double sink and it had a vegetable spray which was on a separate hose connected to the water pipe. He identified it as being the same as the one illustrated in Exhibit 6.

He returned on July 11, 1988, and signed a purchase agreement. With it he received floor plans of the first floor and second floor, but no floor plan for the basement. The floor plan for the laundry room and kitchen showed broken lines in the kitchen as described previously, but no such broken lines in the laundry room.

As with other purchasers, he met Mary Sirota twice to choose the colours for various items as well as the rugs, etc. On both occasions, the form included laundry uppers for which 5100 white was the colour chosen. When he moved into the home, he discovered that there were no laundry uppers in the laundry room, and that the vegetable spray he thought he was to receive had been

replaced by a device attached to the faucet which he called "an aerator". The Certificate of Completion and Possession made no complaint with respect to Laundry Uppers.

The device which Mr. Sinson received with his sink was not, in his opinion, a vegetable spray. He also stated that it was not the same device he had seen in the display trailer. He presented to the Tribunal a package containing an "aerator". He said that this was the device which he had actually received.

The Tribunal noted that the back of the package listed the various uses of the device among which was included, "it being used to spray vegetables".

Finally, with respect to the cold cellar, Mr. Sinson testified that when he bought the home, he never knew the kind of basement he would receive. He did not expect a cold cellar and the negotiations for the purchase of the home had never raised the subject of a cold cellar. It was only when he checked plans of the basement furnished by the builder to the City that he saw that the builder had provided for the construction of cold cellars. It is on the basis of those plans alone that he bases his claim. None of the documents in the purchase agreement package make any reference to a cold cellar.

In cross-examination, Mr. Sinson stated that laundry cabinets were not mentioned in the list of standard items or any of the other purchase documents. It only was mentioned in Exhibit 12 - the Colour Selection Sheet. He was shown a floor plan of the main floor, including the kitchen and the laundry room. When asked to explain what he thought the broken line in the kitchen was, he stated that he did not know.

With respect to the cold cellar, he admitted that it was months after the purchase that he discovered that some homes had cold cellars and saw floor plans which provided for cold cellars.

With respect to the aerator attached to the faucets, he stated that it had a fine spray and a regular spray; that is, two positions.

This concluded the case for the Applicants.

In defence, the New Home Warranty Program's first witness, Mr. Sam Herzog, the builder of the subdivision, stated that the subdivision contained 40 homes. There was a sales trailer on the site containing samples and manned by Mr. Klim. With respect to cold cellars, Mr. Herzog testified that some homes were indeed provided with cold cellars, but they formed part of a



negotiated sales price. He said that the master plans of the basement deposited with the City, included a cold cellar. This was done not because the builder intended to provide all homes with a cold cellar, but rather to allow for a cold cellar to be built without having to go to the City for a further construction permit if the sales contract specifically included a cold cellar.

The reason he did not provide each buyer with a floor plan of the basement was because the basements were to be standard; a cold cellar would constitute an extra for which the builder intended to charge \$1,000 more.

He went on to state that cold cellars were not offered to buyers; buyers had to request and pay extra for it. In this regard, he deposited Exhibit 17, a guidebook setting out the additional price for each option chosen by a potential buyer. On page 1, under the heading "STRUCTURAL - EXTERIOR" appears Cold Cellars and beside it, the figure of \$1,000, being the additional price. This price was later increased to \$1,300.

In building the cellar, an area was roughed in which could be used as a cold cellar should the option be exercised.

Mr. Herzog was adamant that cold cellars were extras which formed part of the negotiation of the sales price of any home. Afterwards, a buyer would have to pay \$1,000 for it. In this regard, he produced as Exhibit 18 an Agreement of Purchase and Sale with one Francesco Tedesco. Schedule "C" specifically provided that the vendor was to build a cold cellar under the front porch with a vent on the side. It was included as part of the purchase price.

He then referred the Tribunal to the purchase agreement with Mr. Sinson which also contained a Schedule "C" and in which other items were provided at no extra cost as part of the negotiated purchase price; but these items did not include a cold cellar. In other words, in the case of certain buyers, certain additional items might be included in the purchase price whereas with others, other items would be negotiated.

The negotiated sales price would fluctuate in such a way as to reflect the value of Schedule "C" items.

With respect to the vegetable spray, Mr. Herzog referred the Tribunal to the list of luxury features which described it as a "vegetable spray faucet attachment." He said that he was very careful in choosing the wording in order to indicate exactly what it was that the purchaser was to receive; he did not know how he could have made it any clearer. The device was to be attached to



a faucet, rather than stand-alone and attached to a separate hose plugged into a pipe under the sink.

He went on to say that, even though certain of the witnesses testified that they had seen a vegetable spray attached to a hose, the trailer did not have any such vegetable spray on display. At no time, had his company even purchased a hose vegetable spray.

With respect to the laundry cabinets, Mr. Herzog stated that they were not included in the purchase price. Schedule "A" set out which cabinets the purchaser was to get. While he admitted that the wording "Quality kitchens as per Vendor's samples" did not mention the word "cupboards", this was nevertheless what was referred to in as much as the vendor's samples for the kitchen included cupboard doors. No such reference is made with respect to the laundry room.

He went on to state that the purchaser was fully informed of which rooms were to contain cupboards by the floor plan which he received. These plans show a broken line in the kitchen which is the construction industry's symbol for cabinets; no such broken line appears in the laundry room. For this reason any buyer should have known that only the kitchen would have cupboards.

He admitted that the Colour Selection Sheet, Exhibit 12, contained the designation Laundry Uppers and that Mary Sirota had filled in a colour beside this item. This chart was completed months after the sale of the home. The inclusion of the Laundry Uppers in the chart occurred because a similar chart was used for all the subdivisions for which he built homes. In certain subdivisions, Laundry Uppers were included as standard items. By mistake, he had not eliminated Laundry Uppers when he had typed in Scarborough Heights on the top of the Colour Selection Sheet.

This had led to Mary Sirota mistakenly including a colour choice for this item. Ms. Sirota was hired after solely to fill out the Colour Selection Sheet with buyers. She assumed that every item on the sheet should be filled in and had no personal knowledge of what items were to be included as standard items.

In cross-examination, Mr. Herzog said that there are two types of vegetable sprays: one, attached to the faucet and the other, attached to a pipe underneath the sink.

He also stated that the only kitchen samples in the display trailer were the cabinet doors, tiles and faucet.

The next witness was Mary Sirota. She testified that she did not have copies of the sales contracts of each purchaser

when she filled in the colour selection forms. All she had were samples and a guide book setting out the cost of optional extras.

She stated that she went through the form with each buyer, item by item, filling in the colour chosen. She was not familiar with what features each home was to contain and based herself solely on the form. She testified that she asked the colour of their choice for the laundry uppers without knowing that they were not entitled to them. She did this solely because the item was listed on the form.

In cross-examination, Ms. Sirota testified that she filled in every item on the form, whether it applied or not, in order to make sure that everything was covered. The buyer and seller knew what was included and, therefore, she saw no problem in filling out each item.

Finally, with respect to the vegetable spray, she testified that she had personally bought the same type as the builder provided.

The next witness, Mr. Sheldon Kowinski, the construction superintendent for the builder, stated that he set up the trailer together with the builder. He testified that there was no kitchen sink in the trailer but only the faucets. There was no vegetable spray attached to a hose in the trailer despite the testimony of some of the buyers that they saw a hose attachment. He himself ordered the vegetable spray attachment and these were installed at the time each purchaser took possession of his home.

When he filled in the Certificate of Completion and possession with Mr. Sinson, Mr. Sinson never mentioned any problem with the vegetable spray or cold cellar. As to the Laundry Uppers, he told Mr. Sinson that it did not appear as an item in Schedules "A", "B" or "C", and he was, therefore, not entitled to them.

The final witness was Mr. Ed Perryman of the New Home Warranty Program. He has dealt in the residential home field since 1958.

He testified that he asked a plumbing supplier for a vegetable spray in order to find out what exactly a buyer should expect. He stated that the supplier offered him with the exact same device that the Applicant received in his home. This did not surprise him, because it coincided fully with the description of what was to be provided in Schedule "A"; that is, a device attached to the faucet.

Mr. Perryman was cross-examined on the cold cellar. He stated that many items are put into building plans, but this does not mean that the builder is obliged, therefore, to provide them. He also testified that a broken line in a floor plan was a symbol for cupboards.

As the Tribunal previously stated, the Applicants are only entitled to those items specifically agreed to in the purchase documents. Subsequent documents such as the colour chart can be referred to in order to interpret more fully what the parties intended, but cannot be used in order to add to the obligations of the vendor.

In similar fashion, the basement floor plan alone, deposited with the City, cannot form the basis by which the vendor is found to have agreed to supply a cold cellar at no extra cost. It can be used to interpret any matter in the contract which is not clear, but not to create the obligation. Thus, if the builder did not agree to provide a cold cellar as a standard feature, the general floor plan cannot create an additional undertaking.

On the basis of the evidence presented, the Tribunal finds that the vendor provided detailed, complete, and relatively clear information to the buyer of what he was to receive when he purchased his home. He not only provided a long list of features covering every area of the house but also floor plans of the main floor and top floor, which set out the items to be provided in each room and each area. To further clarify the obligations of the vendor, Schedule "C" was drafted to show any upgrades that were to be included in the purchase price.

The Tribunal comes to the following judgement with respect to the three items of claim:

VEGETABLE SPRAY:

The question for the Tribunal to decide is whether the device provided to the buyers, known as an aerator, constituted a "vegetable spray" as described in the list of luxury features in Schedule "A".

In this regard, the Tribunal notes that despite the testimony by certain buyers that they had seen a vegetable spray attached to a hose, the evidence indicates that no such device could have been in the display trailer. The representatives of the builder were categorical in stating that no purchase of such a device had been made and certainly no such device was in the trailer, since the trailer did not even contain a sink.

The buyers, who said they saw such a device, were unable to say on which side of the sink they saw it or what colour it was. The Tribunal can only conclude that those buyers were mistaken in their memory of what they had seen.

Did Mr. Sinson receive the vegetable spray to which he was entitled? The Tribunal believes that he did for the following reasons:

- 1) The device he received was attached to his kitchen faucet in the manner set out in Schedule "A";
- 2) The purpose of the device was to serve as a vegetable spray. This is clearly borne out by the package which Mr. Sinson brought to the Tribunal and which states that the aerator device may be used to spray vegetables, as well as by the testimony of Mr. Perryman of the New Home Warranty Program, who was shown a similar device when he asked for a vegetable spray.
- 3) The device which Mr. Sinson seeks does not resemble the one promised in Schedule "A" because it is a hose attachment to a pipe and, therefore, not attached to a faucet.

The Tribunal finds, therefore, that the builder did not make an illegal substitution, but rather provided the exact item promised. The New Home Warranty Program was, therefore, justified in refusing this claim by the Applicants.

#### LAUNDRY UPPERS:

Was the vendor obliged to supply the purchaser with laundry uppers at no extra cost? The Tribunal believes that the vendor was not. Nowhere in the purchase package is it indicated that the Applicants had a right to laundry uppers. Quite the contrary, the only reference to samples of doors appeared with respect to the kitchen in Schedule "A". There were no samples with respect to the laundry room indicated in Schedule "A".

It is also in evidence that Mr. Sinson was not promised, nor did he ask for, laundry uppers when he negotiated the purchase. If the Applicants had any doubt as to what was included in the laundry room, they had only to refer to the floor plans which they had received at the time of the purchase. They showed clearly, by through the broken line, that cupboards were to be supplied in the kitchen but not the laundry room.



It is clear from the testimony of Mr. Sinson that he is a very careful purchaser who checks on what is contained in an agreement. The Tribunal must presume that he knew or should have known what the broken line meant or that he would have asked about the broken line had he not known. The testimony of Mr. Perryman and representatives of the builder clearly demonstrate that a broken line is an accepted symbol used in building plans to show cupboards.

Did Mary Sirota's mistake in filling in Exhibit 12, the Colour Selection Sheet, result in an additional obligation by the vendor, viz. to provide, at no extra cost, laundry uppers? The Tribunal does not believe it does.

Miss Sirota made a mistake, but such an error would not legally result in imposing an additional obligation on the vendor which he had not undertaken in the original sales documents. Since the documents of sale clearly show that the vendor was only to provide cupboards in the kitchen, he cannot be obliged to provide such cupboards in the laundry room solely because of an error by Miss Sirota in filling out a colour chart.

The purpose of the colour chart was surely not to indicate new items that the vendor was obliged to provide, but only to indicate the colour the purchaser desired for items to which he was entitled. To hold otherwise would be to unjustly enrich the Applicants at the expense of the vendor. This is not the intent of the New Home Warranties Plan Act. The Applicants were never entitled to receive laundry uppers and for this reason the New Home Warranty Program was justified in refusing this claim.

#### COLD CELLAR:

Were the Applicants entitled to a cold cellar? Again, in referring to the documents of sale, not one document or schedule even mentions a cold cellar. In Schedule "A", Luxury Features, any reference to the basement makes no undertaking to provide a cold cellar. The purchasers were not provided with a floor plan of the basement, specifically because it was to contain no special features.

Furthermore, the Applicants in their negotiations with their vendor admitted that they, at no time, raised the issue of a cold cellar or their desire to have one. They did ask for certain other extras in Schedule "C" which were included in the purchase price. Presumably, if they had wished a cold cellar, this could also have been negotiated. This is what actually happened in the case of Mr. and Mrs. Tedesco, who in their Schedule "C" included a cold cellar, but not any other item.



What was important to the Tedescos was not a matter of interest to the Sinsons and vice versa, since the Sinsons asked for other extras which the Tedescos did not.

Thus there is nothing in the documents of purchase, which in any way obliged the vendor to provide a cold cellar.

The question the Tribunal must decide, therefore, is whether the plans submitted by the vendor with the City imposed an obligation on the builder to provide a cold cellar or in some way can be used to demonstrate an intention to provide a cold cellar to the Applicants. Again the Tribunal does not believe so.

It is clear from the testimony of Mr. Perryman and the builders, as well as the practice in the industry of which the Tribunal takes judicial notice, that a builder's floor plans will often include items which may or may not be built. This is done to assure the builder that he need not return to the City for further permits. It is well known that such supplementary procedures are very time consuming. The City may take many months to approve changes or additions to plans.

The floor plans provided by the builder to the City did no more than give the builder the right, but not the obligation, to build a cold cellar. And, in fact, the evidence shows that where a cold cellar was actually provided, it was done pursuant to Schedule "C" and, therefore, negotiated at the time the sale was made.

The vendor did not oblige itself to provide a cold cellar to the Applicants and the Applicants did not have the right to receive one. The Registrar was, therefore, justified in refusing this item of claim.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MR. AND MRS. CHARLES STILES

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
ALBERT LONGO, Member

APPEARANCES:  
RONALD F. ADAMS, representing the Applicants  
  
STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 25, 27 July 1990 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program disallowing the appellants' claim for reimbursement for three deficiencies in the construction of their home at 6 1/2 Pioneer Crescent, Thorold.

Charles and Marla Stiles entered into an Offer to Purchase through a Realtor, Alan Hill, to buy the home on October 1, 1988 with a closing date of December 20, 1988. Prior to the purchase, the builder, one James W. Rogers gave them a copy of the plans which provided for a main floor powder room. When they took possession, however, the house had no powder room on the main floor which now forms one of the claims in this appeal. A damaged carpet and failure to provide a walk-in closet make up the other two claims.

Marla Stiles, in her evidence, says that the builder gave her the plans prior to the purchase and that she later obtained a copy of them from the City of Thorold where they had been filed. She said that both sets of plans were identical, no change having been made in the plans filed and both provide for a powder room on the main floor. She further maintains that although she and her husband dealt primarily with the real estate agent, Alan Hill, he never advised them of any change in the plans.

The Offer to Purchase was prepared by the agent and was signed in his presence. It contained reference to Schedules "A" and "B" also forming part of the contract. Attached to Schedule "B" is Appendix 'E', a Specification Sheet, enumerating some 44 items to be included in the house. This document was signed by both the purchasers and builder and bears the date October 12.

The Specification Sheet in Item 36 provides as follows:

Quality broadloom throughout except in kitchen, main bathroom, ensuite bathroom, main floor powder room, laundry room, laundry areas and front entrance vestibule areas, to be chosen from builders samples.

Section 41 provides:

One towel bar, one paper holder to be provided in each bathroom and powder room.

And in Section 42:

Bathroom vanities, kitchen cabinets, to be chosen from builder's samples.

We note that not only is there a clear reference to the installation of a power room, but also to two other bathrooms.

Mrs. Stiles in her evidence said that she and her husband had gone through the house the night before closing and with few lights on did not notice either the absence of the powder room or the walk-in closet. But the next day, in noticing no wash basin or toilet in what was expected to be the powder room, she advised the builder, whose response was simply that he had "screwed up" and would see about it. She pointed out that she had been in the house only once between signing the Offer and the final inspection. It was not until one year later, however, that she notified the Program of the missing walk-in closet. That was on November 15, and it appears that they took possession on November 16.

Charles Stiles in his evidence observed that he had seen the listing agreement which provided for two bathrooms in the house. He said he was never advised by the agent, Mr. Hill, that they would not have two bathrooms, a 4-piece and a 2-piece powder room. He further testified the builder admitted there was "a screw up" on the plans. He apparently did not notice the absence of the walk-in closet until a year later when he was examining the plans.

A Mr. William Walters was called as a witness by the appellants who owns a construction company and had been in the business some 40 years. He observed that the powder room could have been installed, but it would now be very costly, perhaps \$5000, because the stairs are farther back than they appeared on the plans and the powder room would now extend into the living room.

With regard to the change in plans, he said the Ontario Building Code provided that no changes could be made without the builder applying for them in the Building Permit. He further pointed out that it would have been easy for the builder to apply for a change of plans and there is no doubt that the building department would have permitted it. He said that the plans show a walk-in closet of about 5 x 5 feet whereas the one built is about 2 x 5 feet and has sliding doors.

The real estate agent, Alan Hill, was called and said he had eight listings on homes being built by Rogers - two groups of four semi's and all listed at the price of \$79,900. He had put two bathrooms on the listing agreement since this was what was on the plans submitted to him by the builder. Rogers told him that the Stiles couple were interested in a house and asked him to see them. Although the original listing dated April 14, 1988 showed two bathrooms, it was revised on June 14, 1988 deleting one bathroom (the powder room) and replacing it with a three-piece rough-in downstairs in the basement. He sent the revised listing immediately to the St. Catharines Real Estate Board which publishes the weekly and multiple listing service. At no time, however, did he get a set of plans to conform with the new listing.

On June 25, 1988 an offer was discussed with Mr. and Mrs. Stiles and signed by them. This was on 8 1/2 Pioneer Crescent and the closing date was apparently in September. Hill maintained he advised the Stiles that there would be no 2-piece powder room. He said that there was none in any of the other houses either, and explained that to them. This offer fell through and the Stiles considered making an offer on the house next door, which was 6 1/2 Pioneer Crescent.

Hill said he took the Stiles through the property, which was unfinished, and both he and the builder who was present at the time told Stiles there would be a roughed in bathroom in the basement instead of a powder room. Stiles then made the offer on 6 1/2 Pioneer Crescent on October 1, with a closing date of November 16. Continuing in his evidence, Hill observed that he saw Stiles in the house on at least two occasions between the date of the offer and the final inspection. He went with them when they complained about the colour of the carpet which they did not like.

He said at that time the house was close to being complete and the walls were taped and painted. At a later date when Stiles wanted to pick the colour of the stain, he was with Stiles and Rogers in the house and they went next door to inspect the colour of the stain used in it. On none of these occasions did either of the appellants complain about the absence of the powder room. He said the only complaint came from the builder who had called him objecting to Mrs. Stiles going over to the house and giving instructions to the trades. He was told to advise her to stay away unless she went with either of them.

Hill said he is no longer associated in listing any of Rogers' houses since he never completes the things he should and it effects his reputation as a realtor. Under cross-examination he observed, "If someone comes to me and tells me he intends to buy one of Rogers' homes, I advise them not to do so." He admitted he had not told Stiles there would be a new set of plans because he was never given any, but contended Stiles was told there would be no powder room and he could obviously see there was none in going through the house. Although Mrs. Stiles said she called the builder about the powder room after closing, no call was ever received by Hill.

As a result of the complaints by Stiles, Merna Morris, a conciliator with the Program was brought into the picture. She said she visited the house on March 22, 1989 with Rogers, the builder and Mr. and Mrs. Stiles. This visit culminated in a cash settlement to Stiles in the sum of \$6,200 for all other items, excluding the powder room. She said this was not warranted because it was not included in the Offer to Purchase. She examined the carpet down on her knees and could see no stains about which Stiles had complained.

On November 15, 1989 she received a call from Mrs. Stiles to the effect she wanted to add the walk-in closet to her list of complaints which she just noticed was missing. This was one year after possession had been taken by Stiles.

In December, 1989, another conciliation meeting was held at the home with the same people present. She still saw no stains on the carpet. There was no walk-in closet, but she made it an A (2) item on her report because it was not, in her view, warrantable. The only discussion at this meeting about the powder room was when Mrs. Stiles complained they had paid \$2,500 extra to the builder for a completed bathroom downstairs when the neighbours got one free, and Mrs. Stiles admitted to her she knew she was not going to get a powder room.



In January, Mrs. Morris returned to the house and was again shown the carpet. She says it had changed between the December inspection and this visit, and now showed some stains which were not there before. She could not explain it since there was no evidence of any marks or stains on her previous visits.

Exhibit 11 is a Schedule of items covered under warranty and is an amendment to Schedule "A(1)" dated June 13, 1989. It reads:

Amendment to Schedule A(1) dated June 13, 1989.

1. HOME DOES NOT HAVE A MAIN FLOOR POWDER ROOM. The builder has not installed a main floor powder room as is shown on the approved plans registered with the City of Thorold. This is considered a minor substitution and the builder is required to remedy.

This document is signed by Merna J. Morris.

She testified she had initially denied the claim because she could not find the powder room formed part of the Offer. Her decision, however, was changed by her Assistant-Manager and his decision was again changed in the Program's final determination.

With reference to the walk-in closet, she said that it was very unusual, in her opinion, for Mrs. Stiles to call the day before the warranty expired to complain about this item in view of all the correspondence that had gone on before. November 15, 1989 was the first occasion that she had heard about it.

Andrew Richters, a Senior Conciliator with the Program for ten years, was twice in the Stiles home. On these occasions, June 13, 1989 and December 13, 1989, he examined the carpet very carefully and asked to be shown the worst areas. Mrs. Stiles directed him to the stairs, but he could see no stains even on his hands and knees. He said there was no discussion about a walk-in closet and if one had been put in, it would have impeded the use of the stairs.

On the June inspection it appears that Mrs. Stiles was unhappy with the result and asked for a different conciliator. With regard to filing a change in plans, Mr. Richter said that it was not the practice for the builder to go back to the City for a change in the Permit.

Under cross-examination, he stated he told Mrs. Stiles he could see no discoloration on the carpet, but if she would have

an expert give a report on what she found wrong, it would be considered. Instead she obtained a cleaner's estimate to clean the carpet, but that was not what he had suggested.

In a conversation with the builder, it was admitted that the plans were changed because he could not get either a powder room or closet in where they were originally intended. He assessed the closet in the area of some \$300.

Mr. Adams, counsel for the Stiles, argues that the listing agreement provides for a powder room, as well as the main bathroom but this document was revised in June, four months before Stiles entered into his Offer. It was changed clearly on the instructions of the builder to the realtor, when the former realized he could not build the house completely in accord with the filed plans. This document, in any event, does not form part of the Stiles contract although they may have been attracted by it initially.

He further argues that there is a statutory provision in the Building Code which requires the builder to build in accordance with the Code. We agree with that proposition, but there is nothing in the Building Code which requires a builder to build according to the plans. It only requires the builder to notify the building department of a change in plans. Mr. Adams further points out that there was no consideration back to the purchasers to contract out. There was, however, the substitution of the roughed in bathroom in the basement, in lieu of the powder room, which when ordered by Stiles to be completed cost him an extra \$2,500.

This is a matter in which carelessness, bordering on negligence, is so blatantly clear, it is difficult to find sympathy for any of the parties. Hill, the realtor, admitted he failed to delete the powder room from the specifications thinking that by telling Stiles he would receive no powder room, the latter would honour this arrangement. It would have been no trouble for Hill to make the amendment at the time the Offer was signed, but he did not think of it or, perhaps, did not expect the specifications to form part of the offer. To be fair with him, however, we note the builder's contract containing the specifications was a separate document and signed on October 12, whereas the Offer was signed on October 1. Hill's signature does not appear on the builder's contract and he may not have been present.

As far as the builder Rogers is concerned, it appears he blithely went along building his house in the expectation that since he had made it clear to Stiles there would be no powder room, there would be no aftermath. The Corporation paid \$6,200 to satisfy the deficiencies Stiles complained about, but this was not

an end to the issues arising from his carelessness and negligence. It is obvious he is not a good builder; on the contrary, his work may be more aptly described as shoddy and even his former agent could not recommend him to any prospective purchaser.

According to the documentary evidence, it is clear a powder room was intended to be installed in this house, together with a walk-in closet. The builder found this impossible and changed the listing agreement with his broker to conform to his new plan, that of substituting the roughed in bathroom in the basement for the powder room. This was not, in our view, a major change and is in accord with the specifications which state in Section 48:

48. The Builder shall have the right to make minor deviations from the plan and specifications without the consent of the purchaser.

It further does not contravene the substitution sections of Regulation 726 of the Ontario New Home Warranty Plan Act.

We, therefore, conclude the builder had a right to change his plans as he later intended with no loss to the prospective purchaser and that the plans were changed in June when the revision was made to the listing.

Were Mr. and Mrs. Stiles apprised of this change and, if so, when? The evidence of both Marla and Charles Stiles is in direct conflict with the evidence of the realtor, Hill, and the conciliator Merna Morris. We are, therefore, left with the issue of credibility.

Although Stiles maintains that neither of them were ever told of the deletion of the powder room, Hill contends that he told them both prior to signing the Offer, and he and the builder also told them in viewing the house prior to its purchase. Hill obviously has no respect for the builder Rogers whom he would not recommend to anyone, and has clearly no material interest in this proceeding. He impressed us with his evidence, given in a manner both forthright and believable. Merna Morris equally has no interest (although a conciliator for the Program), and categorically stated Mrs. Stiles told her she knew they would not be getting a powder room.

In our view, their evidence is conclusive that the purchasers knew what they were getting when they entered into the contract. This is supported by the fact that during its construction, no complaint was made by Stiles, either to Hill or the builder of the absence of a powder room or walk-in closet even

though both Mr. and Mrs. Stiles had been through the house on several occasions. Mrs. Stiles maintains she went into the house only once before the final inspection, but this is contradicted by Hill who was instructed by the builder to keep her away because she was interfering with his subtrades.

On all the evidence, therefore, we come to the inescapable conclusion that the purchasers were fully aware they would not be getting a powder room. We, therefore, find the appellants' claim for compensation for the powder room is without foundation and it is hereby disallowed.

With regard to the carpet, as in any court proceeding, the onus is on the plaintiff to prove his claim. On all the evidence, we find the appellants have failed to discharge this onus and that claim for reimbursement of the carpet must fail.

We view the claim for the walk-in closet, however, in a different light. There appear to have been no discussions about it between Stiles and Hill or the builder, and from the evidence it is clear that Stiles did not even know he was to get the closet until a review of the plans a year later when Mrs. Stiles called Mrs. Morris to complain about it. It was not built, nothing was substituted for it, but a 2 x 5 closet instead of a 5 x 5 called for in the plans.

Mr. Richter estimated the cost of the closet at approximately \$300 and we so find.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Program is directed to reimburse the appellants in the sum of \$300 in full satisfaction of this claim; and the other two claims as noted above are disallowed.

MR. AND MRS. I. STIPIC

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
D.H. MacFARLANE, Member

APPEARANCES:  
C. SILVERSIDE, representing the  
Ontario New Home Warranty Program

No one appearing for the Applicants

DATE OF  
HEARING: 1 December 1989

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. This hearing was scheduled to take place today at 9:30 a.m.; the hearing was first opened at 9:50 a.m. and the Applicants when called failed to appear. The hearing was suspended for a further 25 minutes and began again at 10:15 a.m., at which time the Applicants were again called and failed to appear.

2. The Applicants at no time gave notice to the Registrar of this Tribunal that they would not appear or that they sought a postponement.

3. For this reason, the hearing proceeded at 10:25 a.m. in the Applicants' absence.

4. No evidence has been placed before the Tribunal in respect of the claim by the Applicants.

In as much as there is no evidence before this Tribunal, it must dismiss the claim of the Applicants. Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.



WILLIAM AINIS

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
MAURICE LAMOND, Member

APPEARANCES;

TIMOTHY S.B. DANSON, representing the Applicant

JAMES GIRLING, representing the Registrar  
under the Real Estate and Business Brokers Act

DATE OF

HEARING: 17, 18 December 1990

Toronto

REASONS FOR DECISION AND ORDER

The record indicated that William Ainis was registered as a salesman under the Act on July 13, 1973 and as a broker from 1976 to the present except for a short period between July and October 1989 when his licence lapsed for failure to renew. By Notice of Proposal dated November 10, 1989, the Registrar proposed to revoke the registration of William Ainis for the following reasons:

1. In Ainis's application for registration renewal dated May 1, 1987, he responded "No" to the question of whether there were any unpaid judgements outstanding against him when, in fact, there were some \$40,000 of judgements.
2. From October 5, 1987 until February 26, 1988 he permitted a shortage of \$45,000 to remain in the trust account of the business of which he was the principal shareholder.
3. On July 18, 1989, his registration expired without being renewed.

4. After expiry of his registration, by his own admission to the Registrar, Ainis continued to trade in real estate in contravention of s.3(1)(a) of the Act.

On the basis of these particulars, the Registrar concluded that Ainis was not financially responsible in the conduct of his business contrary to Section 6(1)(a) of the Act and that his past conduct afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty contrary to Section 6(1)(b) of the Act.

With respect to the first particular, Ms. Grace Kwok of the Registrar's office indicated that she was contacted by a judgement creditor of Mr. Ainis in April of 1989 with respect to a small but outstanding judgement of approximately \$700 plus interest. On the basis of that, she examined Mr. Ainis's applications and found the answer "No" to the question of judgements and accordingly wrote to Mr. Ainis on May 19, 1989 requesting an explanation. She indicated that Mr. Ainis attended upon her in her office on May 29, 1989 and delivered a letter to her. In that letter, Mr. Ainis stated as follows:

I am sorry to inform you that I misunderstood the question. I thought the question referred to judgements relating to real estate transactions. Since I made an error in my response, I wish to respond "Yes" to question Number 6 and have enclosed a copy of the Sheriff's Certificate.

As to repayment arrangements, I have not entered into a formal repayment plan to all my creditors. I have paid in full the account to Simpson Sears for \$763.97. I am paying the Canadian Imperial Bank of Commerce at the rate of \$200 per month. The account has been reduced to about \$3,000 from over \$10,000.

It is my intention to repay all of the creditors as my finances permit.

I am sorry for the misunderstanding and will respond "Yes" in the future until the accounts are paid.

Attached to that letter was a Certificate from the Sheriff of the Judicial District of York dated May 26, 1989. In addition, Mr. Ainis forwarded a letter also dated May 29, 1989, but which was received May 30, 1989 by the Registrar, setting out amounts owing to each creditor and the amount which he felt each would take in settlement if he were to have the funds. While the amounts in total were more than \$42,000, the proposed settlement was in excess of \$28,000. On the evidence of both the Registrar and Ms. Kwok, these matters were reviewed with Mr. Ainis on July 4, 1989 and subsequently on September 5, 1989.

The Registrar, in his evidence, indicated a grave concern in his capacity as a protector of the general public that the question as to unpaid judgements had been answered in the negative, particularly in as much, as Mr. Ainis had at the time 20 salespersons working for him. The Registrar was of the view that Mr. Ainis should have better understood the Act, particularly when he had a responsibility for supervising salespersons. He also indicated that he thought that Mr. Ainis had indicated a formal repayment had been entered into.

In his evidence, the Registrar indicated that even if the debts had been settled, he would still have had some concern as to the non-disclosure in answer to Question 6 concerning the judgements. He further indicated that if the question had been properly answered, he would only have been dealing with Mr. Ainis's general financial aspect.

In cross-examination, the Registrar indicated that in the interview with Mr. Ainis in September, he felt Mr. Ainis was not taking the matter of his debts seriously, but acknowledged that perhaps Mr. Ainis did not feel pressure in regard to these debts as they appeared to be personal rather than business related.

While the Tribunal notes that the question in the application for registration does not have such limitation as was stipulated by Mr. Ainis in his letter of May 29, 1989, the Tribunal also notes that in Section 6 of Regulation 891 under the Real Estate and Business Brokers Act, there are references in dealing with the revocation of a bond in clause (d) particularly which provides:

Where judgement has been given against a broker...on any claim arising out of a transaction involving a trade in real estate...

The Tribunal believes that the Registrar was acting honestly in his belief that the question in the application form

was quite clear and that a broker who has been in the profession for sixteen years should be aware of the requirements under the Act. On the other hand, the Tribunal with respect to this particular matter, is of the view that the broker should not be subjected to revocation of his licence which takes away his livelihood, plus that of salespersons working for him, at least on a temporary basis until they are re-registered, given the possibility that Mr. Ainis even though wrongly may have conscientiously believed there was a limitation with respect to the judgements and that those of a personal nature were not required to be disclosed.

With respect to particular number 2, the Registrar in his evidence clearly indicated that Mr. Ainis had brought this matter to the attention of the then Registrar, indicated that he was suing his former partner with respect to the breach of the Act and, in fact, pursuant to an Order of the Registrar brought the trust account into balance on February 26, 1988.

The Registrar also acknowledged in his evidence that the Registrar at the time was satisfied with the action of Mr. Ainis and took no steps to revoke his registration. It is the view of this Tribunal that this matter should, therefore, not be revived as a basis for revoking Mr. Ainis's registration.

With respect to the lapse of the registration on July 19, 1989, Ms. Kwok in her evidence indicated that Mr. Ainis had indicated to her when she brought to his attention, the lapse of the registration, that he had thought that his renewal was being considered as part of the meeting which took place on July 4, 1989, some two weeks prior to the expiry of the registration.

The Registrar in his evidence also indicated that with the number of registered real estate agents in the Province of Ontario lapses do occur from time to time and normally reinstatement occurs on a regular basis. The Registrar also indicated that there would be several months of delay from the July 19, 1989 lapse before notice would be communicated to the salespersons employed by the broker. His evidence was that he thought that the notice would have gone out about the third week in September. Such a notice, no doubt, would have precipitated a speedy response from Mr. Ainis if he had not already had discussions with Ms. Kwok in August of 1989.

With respect to particular 4, the Registrar's evidence in respect to this item was that Mr. Ainis had in his possession a cheque which he was going to deposit in his broker's trust account and so identified this at his meeting with the Registrar early in September 1989. The Registrar indicated that Mr. Ainis

was identifying this as showing how honest he was. The Registrar, on the other hand, was shocked that Mr. Ainis did not consider that his registration had lapsed and, therefore, neither he nor his salesman were entitled to trade in real estate. There was some evidence given that Mr. Ainis seemed to think that the Registrar had the authority to approve registration retroactively so that registration would be of a continuous nature.

Considering all of these particulars, therefore, the Tribunal is of the view that the Registrar in this case is applying a very serious sanction by proposing to take away the livelihood of a sixteen year veteran in the real estate field and creating a substantial problem for the salespersons employed by Mr. Ainis. While the Tribunal considers the Registrar is attempting to act in the public interest, it appears that the Registrar has not considered the fact that the judgements to which he took great exception did appear to be of a personal rather than business nature. The Tribunal is also of the view that the lapse of registration was accidental and that, in fact, the \$45,000 shortfall in the trust account was remedied to the satisfaction of the current Registrar's predecessor.

The Tribunal considers that the Registrar was honestly endeavouring to act in the best interests of the general public, but is of the view, that the revocation of Mr. Ainis's registration is too severe a penalty on the facts of this case. No evidence was given to the Tribunal indicating that Mr. Ainis has, in his sixteen years, behaved at all improperly in his capacity as a registered salesman or broker sufficiently to justify the revocation of his licence.

The Tribunal notes that the Registrar does have remedies under Section 50 of the Act as an alternative, although the time in the present case has now expired.

Moreover, the Tribunal notes with regard to the cases cited to it that terms and conditions were imposed rather than revocation of licences.

In particular, in the Vito Luigi Calogero case reported at (1987) CRAT, p.206, the facts were extremely more damaging than those in the instant case. Nevertheless, the Tribunal at page 214 of that decision stated, "We feel that Mr. Calogero ought not to be deprived of his means of earning a livelihood in this industry provided that the public interest is not in jeopardy." Accordingly, the Tribunal imposed certain terms upon Mr. Calogero.

In the Allen R. Lizotte case (1989) CRAT, p.318, the Applicant Lizotte responded in the negative to convictions which,



in fact, was not correct. At page 322, however, the Tribunal stated: "While the Tribunal believes that the past acts of Lizotte of making false declarations were serious breaches that required sanction, the Tribunal does not believe they warrant the revocation of his registration." In that case, the Tribunal suspended the salesman for a period of three months.

In the Thomas Joseph Peotto case (1986) CRAT, p.207, the salesman answered in the negative with respect to judgements and the answer was, in fact, incorrect. Again in that case, the Tribunal attached terms and conditions to Mr. Peotto's registration ordering him to be employed as a salesperson under a broker for a two year period.

In the R. Ruby Richman case reported at (1986) CRAT, p.212, the Applicant was a disbarred lawyer who had misappropriated client's trust funds. The Tribunal in that case provided that the Applicant could be registered as a salesperson under the Real Estate and Business Brokers Act provided that he paid outstanding judgements.

In the Rodney C. Hart case (1985) CRAT, p.181, the Applicant altered a Purchase Agreement; nevertheless, the Tribunal did not revoke his registration but suspended him for a period of two months. In the Gary M. Gordon case (1989) CRAT, p.289, in this case the Applicant made full disclosure of his criminal record. The Registrar decided that this criminal record, even though identified, gave the Registrar sufficient concern that the Applicant should not be registered. The Tribunal indicated that, in their view, the Registrar had not acted properly and registered Mr. Gordon under supervision. In the Dov Donald Mann case (1987) CRAT, p.245, the Applicant indicated that he had been charged with a criminal offense and on the basis of that, the Registrar proposed not to register him. The majority decision of the Tribunal indicated, however, that he should be registered but subject to terms and conditions.

In all of these cases, therefore, which to this Tribunal seem substantially more serious than the offenses alleged against Mr. Ainis, revocation of registration was not made but rather terms and conditions were imposed.

Counsel for the Applicant proposed to the Tribunal that, in fact, some terms and conditions should be imposed on the registration of Mr. Ainis. Counsel suggested that the conditions should be that Mr. Ainis pay 10% of his commissions to his judgement creditors until such judgements had been paid. Counsel for the Registrar indicated that the enforcement and supervision of such terms and conditions would be almost impossible. The

Tribunal agrees, but does think it appropriate that some reasonable terms and conditions be imposed as suggested by Mr. Ainis's counsel. The only reasonable conditions which the Tribunal views are acceptable are settlement or payment of the outstanding judgements and some period of providing information to the Registrar with regard to the operations of the Applicant.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal and to register the Applicant as a broker subject to the following terms and conditions:

- 1) The Applicant shall satisfy all outstanding judgements registered against the Applicant by payment thereof or settlement thereof on terms satisfactory to each such judgement creditor and file particulars of such satisfaction with the Registrar within three months from the date of the release of this Order or such extended time as may be permitted by the Registrar; and
- 2) for a period of 12 months from the date of the release of this Order, the Applicant shall file with the Registrar within 30 days following each month end, a monthly financial reconciliation of the trust account of Dunhill Real Estate and Insurance Brokers Limited or any other entity of which the Applicant is the sole or controlling broker.

JOHN ERNEST BARROSO

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
MAURICE LAMOND, Member

APPEARANCES;

THOMAS D. KERR, representing the Applicant

ALVIN TORBIN, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 7 November 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by John Ernest Barroso against a Proposal of the Registrar of Real Estate and Business Brokers to refuse his application for registration as a salesperson under the Real Estate and and Business Brokers Act. The relevant facts are not in dispute.

Mr. Barroso came to Canada from Portugal in 1960 at four years of age with his parents and has lived in and around Bradford, Ontario since the early 1960's. He graduated from highschool in 1976 and later studied electronics at George Brown College in Toronto and subsequently appears to have been quite successful in an electronic and electrical appliance business in Bradford in partnership at different times with two brothers. He is married with three children and his wife is expecting a fourth.

There was called on his behalf a quite impressive character witness, Mr. Roy Gordon, a lawyer in Bradford since 1973, who has been a member of the municipal Council and Mayor of Bradford for quite a number of years and has known Mr. Barroso for ten to twelve years. Mr. Gordon appeared to bring to his presentation of character evidence on behalf of Mr. Barroso, a very good knowledge of his standing in the community and good judgement in presenting what he knew.

He told the Tribunal that Mr. Barroso is active in the community for its benefit and that his standing there is one of a fine, upstanding and honest businessman.

Because of an older brother coming back to Canada, who had gone back to Portugal for an interval and who wished to re-enter the business, Mr. Barroso sold his interest in the business to the brother and by way of a new occupation wished to enter the real estate business as a licensed salesperson. He said that his success in meeting and dealing with the public in the electrical and electronics business led him to believe that he would like and would be successful working as a real estate salesperson. He took the necessary courses of the Ontario Real Estate Association and passed his examination on July 22, 1989 with a mark of 87%, and on August 8, he submitted his application for registration to the Registrar's office.

A copy of this application is Exhibit 6 at this hearing.

The difficulties with the application which brought the matter before this Tribunal arose out of his answer to question 6 on page 2 of the application:

Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

To this question, Mr. Barroso answered "Yes", and attached a sheet by way of particulars and explanation on which he stated "In 1980 charged and found guilty of possession of a narcotic." No further information was given in response to the question.

The Registrar's office made a check as to previous convictions registered and as to charges pending and received first its response to the inquiry as to charges pending which informed it that there was pending in Bradford, a charge against Mr. Barroso of assault, Level 1, under the Criminal Code. Mr. Barroso was asked to explain why he had not listed this, and it appears there was a telephone conversation on September 5 between an officer in the Registrar's office and Mr. Barroso in which he was advised of the fact that the office had learned of this pending charge, and he promised to send in an explanation which he did by way of a letter, marked and received by the office on September 8 which letter forms the fourth sheet of Exhibit 6 and reads as follows:

Mr. Gord Randall  
 555 Yonge Street  
 3rd. Floor  
 Toronto, Ontario  
 M7A 2H6

Dear Mr. Randall

This is to advise you of the reason why I did not declare the pending assault charge. Both sides involved are willing to drop all charges therefore I felt this was not significant. Should you wish to verify this fact, I will gladly give you any information necessary to contact the party which initially counter charged me.

I trust you will act objectively and I urgently await your reply.  
 Thank you.

Sincerely,  
 "John Barroso"  
 John Barroso  
 775-4417/775/3454

At the time he spoke to the Registrar's office on September 5 and when he sent this letter, Mr. Barroso was fully aware, not only of his criminal record greater than that which he had reported (of which he was, of course, also aware when he signed the application on August 8), but also of the extent of the concern of the Registrar's office to have accurate information and of the fact that someone there was making independent inquiries.

Nonetheless, no further information was given in this letter. By the time the letter of explanation concerning the pending charge was received in the Registrar's office, it had received its report as to prior convictions which indicated the following:

<u>Date &amp; Place</u>	<u>Charges</u>	<u>Disposition</u>
Feb. 7/75 Newmarket	Poss. of Marihuana	Fined \$50. i/d 5 days



Jul 23/75 Alliston	Poss of a Narcotic Sec 3(1) N C Act	Fined \$204. i/d 21 days
Jul 24/75 Bradford	Poss of a Restricted Drug Sec 41(1) F & D Act	60 days and probation for 2 years
May 19/83 Brampton	1) Traffic in a Restricted Drug Sec.42(1) F&D Act 2) Traffic in a Narcotic Sec 4(1) NC Act (2 chgs)	(1-2) 90 days on each charge conc and probation for 2 years

These are set out in the Registrar's Proposal (Exhibit 2), and in a Memorandum of Agreement signed by both parties which is Exhibit 5. Immediately a further demand for an explanation was made of Mr. Barroso as to why this information had not been included with the original application and a response was received by way of a handwritten letter from Mr. Barroso dated September 28, 1989, which forms pages 6 and 7 of Exhibit 6.

In this letter, he stated that regarding the three charges of possession in 1975, he was young and foolish in handling and experimenting with drugs because most of his friends had been involved with them. With regard to the trafficking charges in 1983, he said that his only explanation was greed and stupidity and that he realized now that these were very serious charges and he very much regretted what he did. With regard to the pending charge, he stated that he knew in his mind that he was not guilty and felt that the charge would be dropped.

As an explanation as to why he had not disclosed this information previously, he said

There are several reasons for the fact that I did not disclose all this information, partly I didn't remember the number and dates of the charges. Now I realize that I should have acquired a police report and should have realized that even though I feel I am innocent on the assault charge, it should have been disclosed. The other reason for the hesitation of complete

disclosure was that I was very ashamed and embarrassed about my past and felt uncomfortable allowing my future employer to see this information.

In the letter Mr. Barroso went on to point out that since that time, he has had a good record, that he is a good husband and father, and has a good record and reputation in the business which he has operated in Bradford and in that community. Supported as this is by the testimony of Mr. Gordon aforementioned, the Tribunal has no reason to take issue with any of these favourable facts presented on behalf of Mr. Barroso.

The next thing that happened in the course of dealing with the problem was the request to Mr. Barroso from the Registrar's office to get it evidence of the actual disposition of the pending charge. He provided the office with a letter dated October 30, 1990 from the Bradford Police Force which letter is Exhibit 7 at the hearing. This letter was addressed "TO WHOM IT MAY CONCERN" and stated that on February 2, 1990 the charge was stayed in Provincial Court and went on to say that this referred to the charge not being proceeded with and did not register a conviction.

The Registrar's office was not satisfied that from this letter it had a sufficiently complete understanding of what had happened and why, and made its own enquiry of the Bradford Police which resulted in another letter dated October 31, 1990 addressed to the Registrar from the Bradford Police Force advising that the charge was 'stayed' in Bradford Provincial Court, for unreasonable delay, and the matter was never tried. This letter is Exhibit 8.

The critical, if not the sole, issue to be determined by the Tribunal here is whether all of this evidence which we have connected with Mr. Barroso's dealing with question 6 of the application and any inferences which should be drawn from this evidence should lead the Tribunal to support the Registrar in his Proposal or not? Without any of this, Mr. Barroso's application would have received a routine approval.

The Registrar, Mr. Randall gave evidence before the Tribunal and went even further and said, that if the record had contained only the convictions in 1975, and the application had disclosed them properly and had also disclosed the pending charge, "We would not be here."

In his evidence, the Registrar outlined his concerns and the basis for reaching the conclusion in his Proposal. He defined the case as one of serious non-disclosure. He said that, in order

to function at all properly with the large number of applications received every year by his office, he must be able to rely upon the information set out in answer to the questions and that this form supplies him with a basic test of integrity and that he found this application inaccurate and most misleading. He went further and said that this pattern of deception follows through the Applicant's dealing subsequently with his office. First discovered was his failure to report the pending charge, and in explaining that, he made no reference to the unreported convictions.

It is also to be noted that the original disclosure of a charge and finding of guilty of possession of a narcotic in 1980 was not correct. This date is in between the dates of the actual convictions and since he could not have forgotten that there were several convictions at two different periods, his explanation as to not remembering the number and dates of the charges does not exhibit the soul of candour. Finally, the explanation as to the disposition of the pending charge set out in the letter of September 8, and also in the letter received by him from the Bradford Police Force on October 30, puts a better connotation upon this matter than does the actual fact which is set out in the police letter of October 31.

In fairness to Mr. Barroso, on this point, it must be noted that he may not have understood fully the significance of the distinction between the withdrawal of the charges, the staying of the same at the request of the Crown, presumably because the Crown attorney felt there was insufficient evidence, or the staying of the same by the Court because of undue delay. However, the fact remains that this element of deception runs throughout all of these documents and this evidence.

The Applicant's sponsoring broker was required to certify that the information given in this application was accurate to the best of her knowledge which she did, undoubtedly in good faith, without any inkling of all of this information withheld. In this last regard, the Tribunal attaches some significance to the fact that, after the initial sponsoring of the application before any of the withheld information had come out, no further support for the Applicant was provided to the Tribunal by the sponsoring broker. She did not appear here as a witness on his behalf and he did not have anything in writing from her, either by way of an affidavit or even a letter.

This issue to be determined by the Tribunal is one upon which we can get considerable assistance from the jurisprudence and indeed, we were referred to a number of cases by Counsel for both parties. Upon careful consideration of the issue to be determined, as set out above, the evidence to which I have referred and the

application of these authorities, to some of which I shall refer hereunder, the Tribunal has reached the conclusion that it should not overrule the Registrar in this case, and it will, therefore, direct him to carry out his Proposal.

The first case cited on behalf of the Registrar was Brenner vs. Registrar of Motor Vehicle Dealers and Salesmen, being a judgment of the Divisional Court in an appeal from the Tribunal heard in March 1983. In that case, the Registrar had refused the registration of Brenner and the Tribunal had directed him to grant a conditional registration. The Registrar appealed and the Divisional Court overruled the Tribunal stating at page 4 of the Report which we have:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Upon the evidence which we have before us in this case, the Tribunal cannot conclude that the Registrar was in error, and therefore, the Tribunal feels bound to uphold the Proposal.

Counsel for the Respondent also cited and relied upon a portion of this judgment which is found at the bottom of page 5 of the report which we have:

...It may be that the Tribunal, if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that

the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year and if Brenner adopts a more forthright attitude in his evidence regarding the conviction for fraud in Michigan or gives a credible explanation as to why he refused to reveal to the Tribunal the nature of the offence to which he pleaded guilty.

This passage would have been of great assistance to Barroso if he had made proper disclosure in answer to question 6, and the issue had been whether this evidence of prior misconduct and convictions on his part afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. It does not, however, assist him in meeting the Registrar's concern arising out of the misleading answer to the question and the deception practised thereafter, or of meeting the issue which the Tribunal sees as the critical one in this case, and which it has determined in favour of the Registrar.

Counsel for the Registrar cited several cases dealing with the question of proper answers to the questions in the application. In Gilford Garage Service and Ambury in September 1982, the Tribunal stated at page 53 of the report which we have:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

The Registrar did not receive a full disclosure of all facts and all the relevant past conduct in this application from Mr. Barroso.

In the case of Jakobs vs. Registrar of Real Estate and Business Brokers heard in June of 1987, the Tribunal states at page 226 of the report which we have:



A criminal record, of itself, is not necessary a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In the case of Williamson vs. Registrar of Real Estate and Business Brokers heard in June of 1987, the Tribunal at p.270 of the report which we have quotes from two previous decisions:

In its decision in the case of Giovanni Giannini (14 CRAT, p.179), the Tribunal stated:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved.

Only persons of complete trustworthiness should be considered suitable for registration and certainly not persons with the kind of gross criminal record of which we have heard today...

In the case of Ronald W. Northover (13 CRAT, p.292), the Tribunal's reasons for refusing to grant registration to an Applicant included the following passage:

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

These principles have been expressed by the Tribunal on many occasions.

Finally, in the case of Doherty vs. Registrar of Real Estate and Business Brokers in November of 1989, the Chairman of this Tribunal dealt with this very point, at the bottom of page 3 of the report which we have:

Mr. Gordon Randall has been the Registrar under the Real Estate and Business Brokers Act since July 1988 and has had some 21 years of detailed real estate experience in his career. He reviewed the grounds for refusal and expressed his concern that Doherty had not been honest and thorough

in his answers. The Registrar must be able to rely fully and without question on the answers given on all applications in order to protect the public interest.

The failure of an applicant to properly answer can allow applicants to be registered to the possible jeopardy of the public.

What the Tribunal said on that occasion applies precisely to the situation and conduct of Mr. Barroso.

Counsel for the Applicant relied heavily on a decision of the Tribunal in Manuel vs. Registrar of Real Estate and Business Brokers decided in March of 1990, in which it is stated on page 8 of the judgment which we have:

Having considered the cases referred to the Tribunal by both parties, and considered the prospects and history of the Applicant, this Tribunal has concluded that each of the grounds upon which the Registrar has based his Proposal has been substantially and fairly answered by Manuel. We conclude that in this situation, there are not even by an accumulation, reasonable grounds upon which registration should be revoked and by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, we direct the Registrar not to carry out his Proposal, but to continue Manuel's registration for the balance of the usual two year term on the following terms and conditions:  
(The terms and conditions set out are not relevant to the case at bar.)

This case must be distinguished on two grounds; in the first place, the principal concern was with the criminal record and convictions themselves rather than with the failure to report them properly in answer to question 6, and in the second place, to the extent there was a failure to report, it was a failure to report matters of more minor concern while the more serious ones were reported, while in the case at bar it was the other way around.

Counsel for the Applicant cited this case and also the

cases of Hayes vs. Registrar of Real Estate and Business Brokers and Grunberg vs. Registrar of Real Estate and Business Brokers in support of the argument that Mr. Barroso should receive his licence here upon certain conditions and, in fact, he filed with the Tribunal a proposed list of four conditions. The Registrar did not agree at all with these conditions or this approach.

The Tribunal agrees with the Registrar that this is not a case in which a conditional licence should be issued. To do otherwise and overrule the Registrar in this respect would be contrary to the principle quoted above from the Brenner case. Also to do so would not give proper effect to the distinction that the reasons relied upon by the Registrar in the other cases for believing that the applicant would not carry on business in accordance with law and with integrity and honesty were based largely on the criminal activities and record which took place sometime in the past, whereas in Barroso's case, the principal problem lay with his very recent misleading answer to question 6 and deceptive practices in dealing with it.

The Applicant also relied strongly upon the case of Nimmo vs. Registrar of Real Estate and Business Brokers, a decision of the Tribunal in May 1989, in which it overruled the Registrar and granted a licence subject to certain terms and conditions. Again, there are important distinguishing factors. One of these is found in the passage quoted to us by counsel for the Applicant at page 10 of the judgment:

The Tribunal finds that Mr. Nimmo failed to make complete disclosure as required by Question #6 of the application; however, Mr. Nimmo is not guilty of non-disclosure but rather incomplete disclosure. For failing to make complete disclosure, Mr. Nimmo must be sanctioned. Should that sanction be refusing to register him as a real estate salesman? The Tribunal thinks not. The crimes which Mr. Nimmo committed were, save for the impaired driving offence, relatively minor in nature and committed at a time when Mr. Nimmo was very young. Mr. Nimmo's serious offences were committed after consuming alcohol. Given his kidney injury, it is probable that Mr. Nimmo shall never drink again. As a result of this, his more mature years, and hopefully, of having learned from his past experiences, one can expect Mr. Nimmo to commit no further driving offences.

A second important one is found in a passage quoted to us by counsel for the Registrar, being the fifth point set out on page 11:

5. Mr. Nimmo has received very strong support from Mr. Gibson with whom this Tribunal was impressed. Mr. Gibson has pledged to supervise and monitor Mr. Nimmo closely. Mr. Gibson's clientele is very well-to-do; his confidence in Mr. Nimmo is, therefore, significant.

I have already commented upon the fact that Mr. Barroso received no support at the hearing from his sponsoring broker.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.



HARVINDER SINGH BHOGAL

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
DR. STEPHEN G. TRIANTIS, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;

MARSHALL SWADRON, representing the Applicant

CHRISTINA CHRISTOPHE, representing the Registrar  
under the Real Estate and Business Brokers Act

DATE OF

HEARING: 2 August 1990

Toronto

REASONS FOR DECISION AND ORDER

In this appeal the facts are not in dispute and, therefore, may be taken verbatim from the Proposal of the Registrar which seeks to deny the Applicant's registration as a real estate broker who at present is a real estate salesman.

1. Bhogal applied for registration as a broker under the Act by application dated August 16, 1989.
2. In reply to question 6. of the application which reads, "Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement." Bhogal answered "No".
3. However, upon receipt of the application, the Registrar conducted a criminal record search against Bhogal, which search revealed the following:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
July 13/82 Toronto	Theft under \$200	Fined \$35 i/d 3 days
4. As well, in his application for registration as a salesman under the Act, dated July 16, 1985, Bhogal denied having been convicted of any offence, although the question was directly put to him.		
5. As well, in his application for renewal of his registration as a salesman under the Act, dated May 5, 1987, Bhogal denied having been convicted of any offence, although the question was directly put to him.		
6. Further, in his application for renewal of his registration as a salesman under the Act, dated June 1, 1989, Bhogal denied having been convicted of any offence, although the question was directly put to him.		
7. In light of the Applicant's repeated failure to disclose his conviction under the Criminal Code of Canada, the Registrar concludes that the Applicant is not entitled to registration under the Act.		

The only reason for refusal is given as, "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty."

The only point for this Tribunal to decide, therefore, is whether the Applicant's failure to answer the question correctly arose out of inadvertence or a deliberate attempt to conceal a conviction from the Registrar.

A Mr. Thomas Clute, policy analyst for the Ministry of Consumer and Commercial Relations, gave evidence of a meeting held on November 1, 1989 with Mr. Bhogal to discuss in detail his answer to question 6. Bhogal said he was working for a trucking firm and had to obtain a tool from the Canadian Tire store, and left without paying for it. He claimed he had been informed by his boss at the trucking company that after three years, "the conviction would be

wiped clean." He also said he had not been advised at the real estate course that the question had to be answered clearly.

The Registrar, Mr. Randall, however, in his evidence said the instructors in the real estate course paid particular attention to telling students to check the Registrar's office if they have had a conviction. Continuing, he pointed out that in the text "An Introduction to Real Estate", a course which must be passed to qualify for registration, there is particular reference to the question concerning convictions and the application form is set out for consideration. As a result, the Applicant could not fail to understand the necessity of answering the question honestly.

The Registrar's concern about this Applicant is that the application is for a broker's licence, not a salesman's licence, and that demands even a higher degree of trust. It requires a supervision of trust funds and a greater responsibility of the broker over that of the salesman. He maintains that the offence of theft is a serious breach of trust and failure to admit the offence compounds it in that the lie is perpetuated with each application. He says that either the appellant understood the question or he is not competent to be a broker.

Under cross-examination, the Registrar admitted that had it been disclosed at the time, it would not have been a bar for a salesman's licence and had it been disclosed the present application for a broker's registration would be favourably considered. He further conceded that there is no record of any complaint against Bhogal as a salesman and no proceedings are contemplated to revoke his salesman's licence. He contends, however, that a broker is in a serious position of trust and his integrity is a role model and educational model for employees.

Mr. Bhogal's former employer, Mr. Frank DiCiaula, in his evidence, pointed out that the conviction arose out of Bhogal's visit to the Canadian Tire store at which time he left without paying for the tool he required. Bhogal had told him about the incident and was advised by DiCiaula that "the conviction would be wiped off in three years."

Mavis Blyth, giving evidence on behalf of the appellant, is a licensed broker and said she never had occasion to question Bhogal's deals when he worked with her. She further stated she thought Bhogal really believed he had done the right thing.

Ajay Jhaver, who had received his broker's licence in early 1989, maintains a brokerage and worked with Bhogal in 1986. He said he knew about Bhogal's problem when he came to work for him, but never had any concerns about him.

Mr. Bhogal is 43 years of age, born in India, and came to Canada in 1971. It appears he has worked hard since arriving here, sustaining his family by working at two jobs as a projectionist in a theatre a night and driving a truck during the day. He is married with two children aged 14 and 15.

He confirms the conviction as he had done in a later letter to the Registrar after his conviction had been disclosed (Exhibit 9). He said he had been told by his employer, the conviction would be wiped clean in three years, a fact corroborated by Mr. DiCiaula. In his letter, however, he writes "I thought I was pardoned by paying the fine." He should not, of course, have taken this advice if he had intended to be licensed in real estate since legal advice is available to anyone who seeks it. He also confirmed, as did the Registrar, there had been no complaints against him.

The law by its nature serves as a balance between rights and responsibilities. It must recognize and observe the right of the appellant to registration weighing that against the responsibility to the public. The preponderance of evidence and the weight given to it then becomes the decisive factor.

In our consideration of this matter, it is incumbent upon us under the guidance of the Brenner decision to find the Registrar is wrong if the appellant's registration is to be granted. We cannot so find. The thread of deception is continued from the beginning and gives us pause to consider its implications.

The Registrar has a right to the truth and this was not disclosed on any of the applications; it was only in a random search of criminal records that he learned of the conviction. He has therefore been misled. We are of the view that its concealment was not inadvertent, but resulted in the perpetuation of the lie. It is this factor which precludes the Registrar from granting the licence as a broker, but which he considers not now sufficiently serious to revoke his licence as a salesman. That would possibly deprive Mr. Bhogal of his livelihood, being entirely and clearly inappropriately punitive. As Mr. Randall has observed, there is a marked difference between the duties and obligations of a salesman, and the responsibility of the broker to the public.

We are aware of the many cases submitted by both counsel and the facts upon which each was decided. There is, however, a consistency running throughout and that is the protection of the public which is the paramount consideration. In this matter, we are compelled to uphold the Registrar since we cannot find his refusal to be wrong. It is again based upon public perception and its consequent protection.

In one sense, it may appear to the appellant to be a punishment for his failure to answer the question correctly. That would be entirely erroneous. As far as the Registrar is concerned, it is purely a matter of his failure to be honest on the many occasions when the opportunity arose and the implications of that in future transactions when the opportunity may again arise.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.



JACOBUS ADRIAN BOEDER

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REINSTATEMENT OF REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
MAURICE LAMOND, Member

APPEARANCES;

J.A. BOEDER, appearing on his own behalf

GAIL MIDANIK, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 25 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Registrar to refuse reinstatement of his licence as a real estate salesman to Jacobus Boeder.

The Applicant had previously been registered as a salesman under the Real Estate and Business Brokers Act effective February 16, 1988, but that licence was terminated on August 8 of the same year at the request of his broker. The reason given was "lack of sales".

The Registrar's reasons for refusal are simply that pursuant to Section 6 of the Act, Boeder is not entitled to registration because

- a) his past conduct affords reasonable grounds for belief that he will not carry on business with law and with integrity and honesty;
- b) having regard to his financial position, Boeder cannot reasonably be expected to be financially responsible in the conduct of his business.

The first reason is based on Boeder's criminal convictions, which although admitted in his application were not fully disclosed to the satisfaction of the Registrar. His

statement attached to his application of May 22, 1989 simply said, "charged with buying and selling firearms as a hobby and as a collector without a proper business permit". He was, however, convicted of five charges on February 1, 1989 and on sentencing fined a total of \$3,500 on April 5, 1989, a fact which he failed to disclose.

The offenses which the Registrar (and the Court) considered as serious resulted in charges under Section 103(8) two counts, and Section 89(1) three counts of the Criminal Code. In the Reasons for Judgment, the Court appears to have been impressed with the submissions of Boeder's counsel that he was in somewhat straightened circumstances, and the fines were accordingly reduced to \$500 each under Section 89(1) and \$1,000 each under Section 103(8). It is to be noted that Boeder had been convicted of a similar offence on November 15, 1977.

The Registrar's office had requested more information from Boeder concerning the charges and received from him a letter dated July 24, 1989 in which he says: "If the fines are a problem, they can be paid right away although I have lots of time because they are not due".

That, however, does not appear to be the way his counsel saw the situation some three months earlier on sentencing when the Court said: "In view of your financial circumstances Sir, I am allowing you one year in which to make the payment of those two fines...and on those three charges Sir, I am allowing you six months in which to make payment of the fines and I am doing that because of your financial circumstances".

The compassion elicited from the Court does not, in view of the present evidence, seem to have been well founded. But if it were justified, it would appear to support the Registrar's second reason for refusal.

Dealing with this second reason, we note that Boeder made an Assignment in Bankruptcy on the 10 day of July 1984. He was discharged on September 11 of 1985. At that time, he was operating a business under the name of "Ranch Restaurant and Truck Stop". According to his statement attached to his application, his employment record is as follows.

May 1986 - November 1986 Innerkip Meat Packers

Nov. 86 - March 1988 Unemployed

March 88 - August 1988 Salesperson Vermeersch  
Real Estate

Aug. 88 - January 1989 Had own butcher shop

Jan. 89 - May 1989 Unemployed

But in a further letter of November 13, 1989 to the Registrar, Boeder paints his financial circumstances as rather enviable implying complete security. It reads in part: "My total net worth is about \$250,000 and I told the court that I was unemployed. That is why they reduced the fine.....so as you see sir I am a happily married man with three teen-aged children, my home is paid for, I have no other debts than a small mortgage on a retirement home. I am financially secure and I have never been a threat to the public".

To support this position, the Applicant tendered in evidence the following letter from the Rochdale Credit Union Limited:

Rochdale Credit Union Limited

April 16, 1990

To Whom it may concern;

Please be advised that Mr. Jacobus Boeder has dealt with Rochdale Credit Union Limited for a period of approximately six years and is a member in excellent standing.

Mr. Boeder's current balance of account is in the area of \$95,000.00, operated as agreed. We consider Mr. Boeder to be a responsible, valued member.

Trusting that this is satisfactory, I am

Yours Truly

Angela McElhone  
Office Manager  
AM:am

If, however, we are to believe the evidence of Mr. Boeder concerning his financial stability and it is uncontroverted we can only conclude that the court in sentencing him was blatantly and unconscionably duped. The means he previously employed to his advantage cannot but now be to his detriment.

Mr. Boeder asks us to accept his evidence concerning his financial circumstances and we do without reservation. We therefore find that the Registrar's second ground for refusal must fail.

But on the first ground of honesty and integrity, we are faced with not only the convictions but a course of conduct designed to gain an end regardless of and at the expense of the truth. Can we conclude from that the applicant is a man of principle? Can we in the face of this evidence find the Registrar wrong? We think not. There is a thread of deception running through the evidence which creates a doubt the Applicant has failed to dispel and demands this Tribunal sustain the proposal of the Registrar.

Under the Brenner decision, it is incumbent upon us to determine on the evidence whether or not the Registrar is wrong in his Proposal. That is supported by the many decisions of this Tribunal wherein it has been held that honesty and integrity are the cornerstones of legislation designed to protect the public interest. In our view, the Appellant has not demonstrated these qualities in his past conduct and the evidence discloses the contrary. The Proposal of the Registrar is therefore hereby sustained.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Registrar is hereby directed to carry out his Proposal.

DEL BORGAL

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
HARRY HAYES, Member

APPEARANCES:

DAVID W. GOLDMAN, representing the Applicant

JANE WEARY, representing the Registrar of  
Real Estate and Business Brokers

DATE OF  
HEARING: 2 May 1990

Toronto

DECISION AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.



JAN BRANDEJS and  
JOSEPH SCHURRER

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF  
REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATIONS

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
A. DONALD MANCHESTER, Member

APPEARANCES:

HOWARD E. KERBEL, representing the Applicant

GAIL MIDANIK, representing the Registrar of  
Real Estate and Business Brokers

DATE OF

HEARING: 4 June 1990

Toronto

DECISION AND ORDER

UPON hearing counsel for the applicants and counsel representing  
the Registrar of Real Estate and Business Brokers;

AND UPON being informed that the registration of Joseph Schurrer  
as a real estate salesperson lapsed as of May 11, 1990;

AND UPON being informed that Jan Brandejs has this day voluntarily  
surrendered his registration, which surrender has been accepted by  
the Registrar;

Therefore, the Tribunal records that there are no issues to be  
decided upon herein and that the hearing is accordingly terminated.

MARY BUTTY

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;

JANE WEARY, representing the Registrar under the  
Real Estate and Business Brokers Act

No one appearing for the Applicant

DATE OF

HEARING: 30 October 1990

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal wishes to commend the Registrar on the philosophy which he has expressed to the Tribunal. This philosophy he has expressed on other occasions as well and we are very much appreciative of his fairness in approaching each individual application. Nevertheless, he is charged by the Legislature with the responsibility of protecting the public and dealing with the question of honesty and integrity of applicants to be registered under the Real Estate and Business Brokers Act.

In his discharge of that duty, he must carefully look at all of the material which an applicant puts before him. He is dependent upon that applicant. The Registrar does not have the staff to conduct intensive investigations and it is, therefore, absolutely essential that an applicant be forthright and open in his or her application before the Registrar.

In the case of this particular Applicant, there are four applications for registration which have been submitted to the Registrar. In three of those, there was not the degree of openness, honesty and integrity divulged, by reason of the fact that some of the questions were improperly answered. In the final application there was an attempt to deal with the question of convictions, but as pointed out by the Registrar, there was still a non-disclosure with regard to the outstanding judgement which had been filed before the Tribunal.

The Tribunal wishes particularly to comment upon the fact that the Registrar did not deal entirely with these applications on their face alone, but that through Mr. Kavanagh there were further interviews with the Applicant and further material filed by the Applicant with the Registrar.

As Mr. Randall indicated, however, in one of the letters that was filed, the Applicant compounded her deceit by indicating that there were charges outstanding when, in fact, these charges had resulted in convictions. No satisfactory explanation has been given for this and it is further evidence of the lack of honesty and integrity of this particular Applicant.

Under the circumstances, therefore, this Tribunal has no alternative, and clearly on the evidence before it, concurs in the Proposal which the Registrar is making with respect to this application.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

CHARLES M. CICERO

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding  
GORDON R. DRYDEN, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;

CHARLES CICERO, appearing on his own behalf

ALVIN TORBIN, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 24 May 1990

Toronto

REASONS FOR DECISION AND ORDER

The Applicant applied for registration as a salesperson under the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431, (the "Act") by application dated April 3, 1990. The Applicant has not previously been registered under the Act.

In response to question No. 6 of the application, which reads "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement.", the Applicant responded "Yes" and submitted a letter dated April 3, 1989 to the Registrar with the application.

The said letter read as follows:

The purpose of this statement is to inform you of a conviction of offence under the law.

The offence was sexual assault stemming from a domestic incident in December of 1983. I pleaded guilty to the offence and served three months in jail intermittently on weekends so I could remain employed and provide for the family. I also served two years probation without incident and have not had any difficulty with the authorities since.

It is my intention to apply for a pardon when I am eligible.

I trust this is the information you require to approve my application to become a registered sales person.

If you need any additional information, I may be reached at (416) 628-5098 in the evening or (416) 541-5450 during my working hours.

Mr. Tom Clute and Ms. Marion Hetherington were, in May 1989, both Ministry employees engaged, inter alia, in reviewing applications for registration under the Act.

Ms. Hetherington had reviewed Mr. Cicero's application and, following the usual practice in the Registrar's office where an applicant has given a positive answer to question 6, and the convictions are not simply minor traffic violations, invited the Applicant to the Registrar's office for a meeting.

The meeting in this instance was scheduled for May 10, 1989. Due to Ms. Hetherington's absence from work on that date, Mr. Clute reviewed the Cicero file and met with the Applicant. In reviewing the file, Mr. Clute noted that certain criminal record searches had been ordered but not received. It is unclear whether a police name check search report was or was not in the file when Mr. Clute reviewed it. The name check search would have revealed two (rather than one) convictions for sexual assault. In any event, the Tribunal accepts Mr. Clute's evidence that he was not aware of Mr. Cicero's second conviction until sometime subsequent to the May 10, 1989, meeting. The Applicant did not challenge Mr. Clute's evidence on this point either in cross-examination or in the course of the Applicant's own evidence in chief.

Mr. Clute testified that he learned at the interview with the Applicant that the "sexual assault stemming from a domestic incident in December of 1983" referred to in the April 3, 1989, letter, was, in fact, a sexual assault upon a minor, specifically Mr. Cicero's own step-daughter, who in 1983 was fourteen years of age. Mr. Clute said that the Applicant was co-operative at the meeting, but further stated that he considered the April 3, 1989 letter to be misleading in that the language used, in his opinion, downplayed the true nature of the incident behind the conviction.

Subsequently, Mr. Clute's reservations about the Applicant were enhanced when the criminal record search certificate of conviction and copies of the informations were received by the



Registrar's office. These disclosed that there were, in fact, two separate and distinct convictions registered against the Applicant in February of 1984. One related to the December 1983 sexual assault. The second conviction was in respect of an earlier sexual assault on the step-daughter "between June 1, 1979 and December 31, 1979". During the last mentioned period, the Applicant's step-daughter was nine or ten years of age. The records received by the Registrar's office also disclosed that the Applicant received a sentence of three months concurrent in respect of each conviction, together with a two year term of probation. The probation order, inter alia, prohibited the Applicant from visiting his step-daughter except under adult supervision and as approved by the Children's Aid Society ("CAS"). The Applicant was further ordered to undergo psychiatric assessment or treatment as required by the psychiatric staff of the Oshawa General Hospital.

Ms. Hetherington testified that she considered Mr. Cicero's April 3, 1989 letter to be misleading in that it did not give full particulars of the nature of the offence and, moreover, disclosed a single incident only. There was some confusion at the hearing as to whether Ms. Hetherington had advised the Applicant prior to or after receipt of the full criminal record search replies that his registration would be turned down by the Registrar. In the final analysis, this fact is irrelevant since the Registrar clearly had all the facts prior to the issuance of the Notice of Proposal.

In his evidence, Mr. Randall, the Registrar of the Real Estate and Business Brokers Act, testified that the final decision to grant or deny a registration is his and his alone, although in arriving at his decision, he would, of course, consider the recommendations of his staff members. Mr. Randall testified that he ultimately determined that the past conduct of the Applicant afforded reasonable grounds for the belief that the Applicant would not carry on business in accordance with law and with integrity and honesty. Under Section 6(1)(b) of the Act, this would disentitle Mr. Cicero to registration.

In arriving at this conclusion, Mr. Randall testified that he considered, among other things, the April 3, 1989 letter, which he considered to be both misleading by omission of a full statement of the relevant facts relating to the conviction, and incomplete since the letter referred to a single incident only, omitting entirely any reference to the second conviction or the events in 1979 giving rise to that conviction. Mr. Randall further considered the nature of the offenses of which Mr. Cicero was convicted. They involved sexual assault by a parent on a minor child. Mr. Randall viewed this to be a total breach of the parent-

child trust relationship. Overall, the facts demonstrated not only a propensity to break the law, but a lack of honesty and a lack of integrity on the Applicant's part.

Notably, Mr. Cicero in giving his own testimony, failed, in the Tribunal's view, to provide any satisfactory explanation as to why the April 3, 1989 letter completely omitted any mention of the second conviction arising out of the earlier 1979 sexual assault.

The Tribunal heard the evidence of Carole Klaassen, a psychiatric social worker, who was the Applicant's probation officer during part of his probation period. The Tribunal was most impressed with Ms. Klaassen's evidence which was delivered in a forthright and professional manner and whose evidence was not seriously challenged in cross-examination or contradicted by the Applicant in giving his own testimony.

Ms. Klaassen described the Applicant as being apparently co-operative and as having fluent verbal skills. In the course of her sessions with the Applicant, she was obliged and did caution him as to the limits of confidentiality that he could expect from her since she was serving a dual function of counsellor and supervising probation officer. Mr. Cicero let her know that he did not wish to share certain things with her due to these limits on confidentiality. Ms. Klaassen learned that the victim had complained of abuse in 1980, but that Mr. Cicero had denied this to the authorities and persuaded the authorities that the victim was a "manipulative attention-seeking child". As a result, pending charges were not proceeded with in 1980 and Mr. Cicero's name was removed from the CAS child abuse register. Later Mr. Cicero admitted he had lied and that the abuse had, in fact, occurred.

The evidence of Ms. Klaassen further disclosed that the victim was suffering ongoing emotional and behavioral difficulties until at least February 1987, after which date the witness had no further contact with the victim.

In December 1984, Ms. Klaassen was contacted by police in the course of a "police stand-off" at Mr. Cicero's home. Charges of assault were withdrawn by the Applicant's wife and she was charged with obstructing police.

Sometime after this incident, the Applicant moved to Oshawa and was supervised by another Probation Officer, Kathy Dennis. In 1986, Ms. Klaassen coincidentally came into contact with the victim, who at that time, faced charges under the Young Offender's Act. Ms. Klaassen found the victim to be fearful of the

possibility of a recurrence of sexual or emotional abuse at the behest of the Applicant.

In testifying as to her overall assessment of the integrity of the Applicant, Ms. Klaassen testified that she was of the opinion that the Applicant had generally told her what he thought she wanted to hear. He would answer direct questions, but not volunteer information. She found him to be adept at manipulating the system, never overtly breaching probation but not, in her opinion, making any genuine attempt to rehabilitate. She opined that while the Applicant had acknowledged legal responsibility, he did not, in her opinion, sincerely acknowledge moral responsibility.

During cross-examination by Mr. Cicero, Ms. Klaassen agreed that Mr. Cicero would not, in her opinion, present a risk to children generally or to adults. She indicated that she would have a concern in respect of minor children within Mr. Cicero's family situation.

The Tribunal also heard from Staff Sergeant Joe Loughlin, a 23-year veteran of the Durham Regional Police.

In December 1983, Sergeant Loughlin attended at the Applicant's home in response to a phone call from the Applicant himself. On that occasion, Mr. Cicero admitted to Sergeant Loughlin the sexual assault on his step-daughter, including oral sex and "everything but intercourse".

The Applicant further admitted to Sergeant Loughlin that he had lied in 1980 when he denied the victim's allegations of sexual assault. Subsequently, charges were laid against the Applicant and he pleaded guilty to two counts of sexual assault.

Sergeant Loughlin testified that in December 1984, the police received a call from the Applicant's wife as to a "weapons assault" by the Applicant. Police attended and tried for over two hours to persuade the Applicant to surrender, after which the police forced their way in and arrested the Applicant. The Applicant was charged with common assault and possession of a dangerous weapon. Subsequently, the charges were dropped when the Applicant's wife changed her testimony. She was charged with obstructing police. There was a further police call involving an alleged husband/wife assault in January 1986. Both parties declined to press charges.

In February 1986, a breach of probation charge was instigated by Kathy Dennis, who was the Applicant's probation officer at the time. The proposed charge related to the

Applicant's alleged unsupervised association with his step-daughter contrary to the terms of the probation order. Sergeant Loughlin spoke to the step-daughter and she indicated to him that she would not testify against the Applicant. As a result, no charge was laid.

Mr. Craig Knapman of the Sutton Group brokerage is the Applicant's sponsoring broker. The Tribunal accepts him as a "neutral" witness, although called by the Applicant. Counsel for the Registrar indicated that he would have called Mr. Knapman as a witness had the Applicant not indicated that he intended to do so. Mr. Knapman met the Applicant in February, 1989, when the Applicant approached him with a view to becoming a real estate salesperson with the Sutton Group office in Hamilton. At that time, the Applicant advised Mr. Knapman of his criminal conviction in respect of a sexual assault on his step-daughter. The night before the hearing before this Tribunal, Mr. Cicero called this witness and told him about the earlier 1979 incident as well.

Mr. Knapman indicated that Sutton Group Realty would accept Mr. Cicero as a salesperson if the registration was granted, depending on what, if any, conditions were attached. The office has 30 salespersons and the witness would have limited time to spend supervising the Applicant.

Mr. Cicero called no other witnesses, but gave evidence himself. He testified that in 1980, the impact of what he had done, and what would occur, made him deny the incident to the authorities due to fear of punishment and impact on his family. In 1983, he realized that he needed help. Mr. Cicero stated that he is deeply sorry and ashamed for the crime he had committed and his treatment of the victim. He went on to state that he condemned his criminal activities and that the fact that they were confined to the family unit does not make them palatable. However, he asserted that he is not a risk to the general public at large and has functioned within it.

With respect to his answer to Question 6 of the questionnaire, and his April 3, 1989, letter, Mr. Cicero submitted that were it his intention to deceive the Registrar, he could have simply answered the question in the negative. He pointed out that the first sentence of his letter is worded identically to the wording of Question 6. He submitted that the phrase "full particulars" in Question 6 is open to interpretation. He explained that the incident is something he is deeply ashamed of and which he does not relate to everyone he meets and when confronted with dealing with the incident, he is restrained about detailing it in minute detail. The embarrassing, demoralizing, distasteful nature of the offense leads him to want to suppress the incident.



Mr. Cicero is now divorced from his former wife and has only limited telephone contact with his step-daughter who now resides in another province. He has remarried and testified that his wife is aware of the sexual assault convictions. He is keen to pursue a career in real estate which, he states, holds a special interest for him.

Mr. Cicero stated that he believes his step-daughter has forgiven him. He stated that she seems to be functioning quite well, and he hopes and prays that there will be no long term effect on her.

Over the objections of counsel for the Registrar, Mr. Cicero was permitted to submit as evidence a report dated July 3, 1984, written by Dr. M.J. Moffat, M.D. Alexandra Clinic, Oshawa General Hospital. Mr. Cicero had been advised well in advance of the hearing that counsel for the Registrar would object to the admission of the report unless Dr. Moffat was present at the hearing to be cross-examined on the report. Dr. Moffat was not present at the hearing. The report in question was originally provided to the Registrar at the request of Mr. Clute following the May 10, 1989 meeting. It was clearly part of the file that was before the Registrar when the decision to refuse registration to Mr. Cicero was made. The report was admitted, but with the proviso that the Tribunal would take into account that Dr. Moffat was not available for cross-examination in considering the weight, if any, that should be given to the report.

The Tribunal notes that the Probation Order required Mr. Cicero to undergo psychiatric assessment/treatment at Oshawa General Hospital, where Dr. Moffat practises in the Department of Psychology. The Tribunal accepts that Mr. Cicero saw Dr. Moffat on five occasions between April 26, 1984 and June 11, 1984.

The report, as pointed out by counsel, is dated and untested by cross-examination. Accordingly, the Tribunal is not prepared to give any weight to the opinions expressed therein. The Tribunal would further note that, even if it had accepted the opinions set out in the letter, those opinions are vaguely stated and would be of little assistance to the Tribunal. There is certainly no suggestion in the report that Mr. Cicero has been "cured". On the contrary, the report recommends further family therapy by a family therapist. In that regard, there is some indication that Mr. Cicero may have participated in one or more family sessions at the Hinks Treatment Centre, but no evidence whatsoever of how many sessions he attended or what the outcome was.



In R.G. Brenner vs. Registrar of Motor Vehicle Dealers, the Ontario Divisional Court set forth the principle that the Tribunal should only refuse the Registrar's proposal if it is of the view that the Registrar was in error in concluding that the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Do the facts before the Tribunal substantiate the Registrar's assertion that such reasonable grounds exist in this case?

There is certainly evidence that in the past, the Applicant has broken the law, fundamentally breached a relationship of trust, taken advantage of and abused a vulnerable weaker person, and lied to the authorities. These are certainly not the hallmarks of lawfulness, integrity or honesty.

The Tribunal shares the Registrar's view that the April 3, 1989, letter was misleading and was intended to mislead. It was up to the Applicant to provide full particulars of all convictions and all of the pertinent background facts. These should not be matters to be uncovered by the Registrar's own independent investigations. Mr. Cicero submitted that the term "full particulars" is open to interpretation. In our view, he deliberately and calculatingly "interpreted" the phrase in a manner most advantageous to him; that is, by disclosing as little as he could without giving a false answer to Question 6. Mr. Cicero submitted that he could have answered "no" to Question 6 had he wished to deceive. However, such an answer would have left Mr. Cicero open to prosecution. It has not escaped the Tribunal's attention that just above the Applicant's signature on the application form the following words appear:

Warning: It is an offence to knowingly provide false information on this application and any attachments.

Having observed Mr. Cicero on the stand, the members of the Tribunal are unanimous in finding him to have been less than forthright or candid in giving his evidence. The Tribunal observed, as Ms. Klaassen observed, that the Applicant would only give as much information as he had to.

While Mr. Cicero claims to be deeply remorseful, the Tribunal is not completely convinced of this. It is obviously in the Applicant's interest to say that he is remorseful. But there is no evidence of any attempts on his part to compensate or assist

the victim. There was no current expert advice to corroborate Mr. Cicero's testimony, nor, for that matter, any witness whatsoever to corroborate his assertions that the victim is doing well or that he has accepted full responsibility for what he has done.

The Tribunal has serious concerns about what really happened on the occasions described by Sergeant Loughlin where charges were laid then withdrawn by the Applicant's wife, and later when the Probation Officer attempted to launch a breach of probation charge, but was unable to do so because the step-daughter was unwilling to testify. Has Mr. Cicero accepted full responsibility? He stated in the April 3, 1989, letter that he served his probation without incident and had no difficulty with the authorities since. Does the Registrar and the Tribunal now have full disclosure from Mr. Cicero? The Tribunal has serious doubts.

Based on the evidence, it is clear that the Registrar was entitled to form the conclusion that he did. Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

CARL P. DILLON

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO REINSTATE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
JOHN W. PATERSON, Member

APPEARANCES;

CARL P. DILLON, appearing on his own behalf

C. CHRISTOPHE, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 19 April 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Carl P. Dillon from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse reinstatement of his registration as a real estate broker.

In a series of allegations against the Applicant, '7' in his Notice of Proposal and a further '8' in a Supplementary Notice, the Registrar concludes:

The detailed allegations provided in the aforesaid Notice of Proposal including the allegations herein, support the Registrar's opinion, reason or reasons that the past conduct of the Applicant does afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Director's Certificate tendered in evidence, Exhibit 5, records that Dillon was licensed as a salesman from June 1974 until April 1979 during which time, he was in the employ of three different brokers. He then made application for a broker's licence which he received on February 1, 1980 and practised as a sole proprietor until August 18, 1987 at which time, the licence was terminated. No reason has been given for this termination and Dillon under his application of July 28, 1989 has requested reinstatement of this licence as a broker.

The application contains a question required to be answered and expected to be answered truthfully and with complete disclosure. Question 7 of the application reads as follows:

Has the applicant been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

Although the Applicant answered "yes" to the question, he included only a handwritten notation under it as follows:

1988 - Driving L. suspending or  
prevest (sic) record

No other details were provided which may have led the Registrar to make his own search of the Applicant's record. The search disclosed a series of 8 convictions, as a result of which Dillon was called to explain them. He replied in writing on August 28, 1989, relating the circumstances which led to a conviction for mischief on April 28, 1988, under which he was fined \$100 and given 12 months probation.

The Registrar again called the Applicant concerning his convictions and Dillon replied by letter dated September 18, 1989 as follows:

Sept 18/89

Mr. Gordon Randall

Re: Request for reinstatement  
of Real Estate license

Dear Sir,

In regards to my conviction of theft under \$1000 and my application I submit that I have not did an application with the ministry since 1984 and was not honestly having recollection of the date of my conviction or whether it was ever reported to you.

Although my conviction date, I have come to find out was previous to that date of the actual charge and before I appeared in court.

I submit I was going through difficult times at that time and their (sic) was drinking involved and I left a A & P grocery store in Windsor without paying for \$28.00 worth of groceries.

I have actively sold real estate in Chatham & surrounding area with no business problems for seven years and have attended the alcohol rehabilitation (sic) probation there A.R.F. here in Toronto in 1988.

Respectively yours,

Carl P. Dillon

The Applicant in that letter disclosed no other convictions. Dillon's record, however, indicates five convictions, one of wilful damage, two of theft under \$50, one of theft under \$1,000 and a further one of mischief. His driving record (Exhibit 7) discloses eight convictions for impaired driving and having an excess of 80 mls of alcohol in his blood while driving. These are convictions under the Criminal Code, quite apart from his convictions under the Highway Traffic Act.

Although his convictions range over a period of eighteen years, from 1970 to 1988, Dillon had on two previous applications, August 18, 1983 and August 9, 1985, answered question 7 in the negative thus denying his previous convictions.

In his defence, the Applicant raises the issue that he had forgotten how he had answered the question on previous occasions since disclosure is only required of convictions subsequent to the previous application and he may have assumed all others to be ignored. He also pointed out that he had been advised that the offenses were of a minor nature and would have no bearing on his application. If so, he was given bad advice.

Carl P. Dillon is a man of 49 years of age, who is now employed as a salesman in the advertising business. His last real estate transaction was in 1982. Since then, according to his own evidence, he has been through some difficult times brought on at least partially, by a dependence upon alcohol. He has made an attempt to rehabilitate himself and change his life through his attendance in an alcohol rehabilitation program in Toronto. He offers no excuse for his past conduct, but gives as a reason his consistent abuse of alcohol. The fact that he has now sought



assistance is certainly a mitigating and extenuating factor in our consideration of his application.

The difficulty, however, for this Tribunal is in its reconciling the evidence with the law. This is almost a classic case, embodying all the elements which militate against an applicant - non disclosure, partial disclosure, consistent criminal convictions, alcohol abuse, evidence of reformation and years spent apparently without purpose or regard for those which remain.

We do not judge him, neither do we condone his behaviour, but only sympathise with this man whose future could possibly have been more consistent with his potential. Dillon is not unintelligent, but his behaviour has been sufficiently irrational to lead only to the conclusion of unreliability and that, in itself, leads to some concern were he to be licensed to practise in this field.

The Tribunal is bound by the weight of the evidence and the latitude of the law. That latitude must be found within the confines of Section 6(1) of the Act which provides:

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Honesty and integrity are cornerstones of the legislation. Therefore, when we are confronted with non-disclosure, partial disclosure, and criminal convictions, we must consider them as a reflection of the Applicant's integrity. Is there an attempt to deceive the Registrar in this failure to disclose the convictions? The evidence may either point to that or to the conclusion that it was the result of inadvertence. The onus, however, is immediately put upon the Applicant to prove inadvertence. In this matter, the Applicant has failed to satisfy that onus.

Section 6 of the Act leads us to other considerations: public perception always stressed by the Registrar and the free admission to homes of an unsuspecting public thereby placing the owners at a potential risk, again a very serious consideration of the Registrar. These naturally flow from the legislative demand for honesty and integrity.

Consequently, we are of the view that the Applicant's application must be denied. We can hold no other view than that the Registrar is right and his Proposal must be sustained.

We are, however, also of the opinion that the application is premature and after a period of some stability in his life, the Applicant may well be viewed in a different light. Neither compassion, however, nor understanding can substitute for lack of honesty or integrity.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

GLEN G. GALBRAITH

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
KENNETH RAVEN, Member

APPEARANCES;

GLEN G. GALBRAITH, appearing on his own behalf

JANE WEARY, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 22 June 1990

Ottawa

REASONS FOR DECISION AND ORDER

The Tribunal has deliberated and is very appreciative of the candour of Mr. Galbraith in his presentation to us. We are also very concerned about our obligation in dealing with the enforcement of the Act which is, as has been expressed by Ms. Weary, a public protection statute. This imposes upon the Registrar a very major responsibility in screening applications. It also imposes a very great responsibility on applicants under the Act. It is impossible with the staff that the Registrar has, that all checks be made, and it is, therefore, incumbent upon applicants under the Act to be candid, forthright, honest in their presentation because in putting forth their application, they are assisting the Registrar in his duty to the general public.

It is also important to consider whether the application put forward is true in all respects because that is evidence of the honesty and integrity of the applicant and, therefore, much consideration by this Tribunal has been given to the application as made by Mr. Galbraith in the present circumstances.

In particular, the Tribunal has looked at Mr. Galbraith's answer to Question 6 and Question 3(a). In his response to Question 3(a), Mr. Galbraith identified the fact that he had been registered as a salesman under the Motor Vehicle Dealer Act which is a similarly regulated industry. In answer to Question 6, as to whether he had been guilty of offenses or were there any charges pending, he identified "not since last registration", and the only

registration identified was that under the Motor Vehicle Dealers Act.

The Tribunal examined, as well, the Note in Section 6 which states:

Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing.

Because of the fact that the only registration and the exhibits presented to the Tribunal indicate that Mr. Galbraith had not been previously registered under the Real Estate and Business Brokers Act, the only registration which could be considered would be that under the Motor Vehicle Dealers Act.

Therefore, in the view of this Tribunal, the answer initially by Mr. Galbraith to this question was a proper answer. However, he went on to file with the application, a letter which identified the fact that he had been convicted of an offense in 1979 and that there had been no other convictions. This is not a correct statement. If that letter had not been there, his answer to the question might very well have been proper. There is some confusion as to whether the convictions in 1985 occurred prior to the expiry of his registration under the Motor Vehicle Dealers Act so that there may have been no attempt by Mr. Galbraith to deceive, but there was considerable inaccuracy by these combined documents.

Furthermore, there was a reluctance to give full disclosure by Mr. Galbraith to inquiries made to him by the Registrar. In the view of this Tribunal, it was incumbent upon Mr. Galbraith to be absolutely forthright in his dealings with the Registrar and there is some doubt in the mind of the Tribunal that this occurred in the subsequent correspondence which took place between Mr. Galbraith and the Registrar.

There is also the question of charges pending, and the Tribunal accepts Mr. Galbraith's statements today that he honestly believed that those charges would be withdrawn. However, it is again the view of this Tribunal that it was incumbent upon Mr. Galbraith to have revealed that fact to the Registrar, including perhaps an explanation as to his thoughts that the matters would be withdrawn. It would have perhaps been fairly simple to check then as to the circumstances surrounding the nature of the charges, the circumstances, the parties involved. And had that been forthcoming the Registrar's view, as he has expressed them here today, would perhaps have prevailed in that Mr. Randall indicated that the charges and convictions in themselves were not of a nature

that would endanger the general public, that they were of a personal and moral nature, and that some explanation and character evidence, might, had it been forthcoming from Mr. Galbraith, have been sufficient to satisfy the Registrar as to the circumstances pertaining to those charges.

The Registrar might then have imposed certain terms and conditions upon the registration of Mr. Galbraith. But unfortunately the Registrar was not given that opportunity and this does, unfortunately, go then to the question of honesty and integrity.

The Tribunal also has to consider that this application before it is a hearing de novo, that is, it is a fully open and new hearing at which the applicant is entitled and, in fact, required to bring forward evidence to support his position and to convince the Tribunal that the Registrar's decision should be overturned.

The Tribunal recognizes that Mr. Galbraith is not a lawyer, and perhaps does not fully appreciate the procedures which should be followed. Nevertheless, a very important aspect of any application for registration under the Real Estate and Business Brokers Act as a salesman is the endorsement, support and confirmation by a sponsoring broker. It is this Tribunal's view that it was important to have before this Tribunal on this hearing some strong evidence of the support of the sponsoring broker.

In counsel's argument to the Tribunal, it was pointed out that there was some question as to whether the sponsoring broker was fully aware of the charges that had been pending, even though they have now been withdrawn. It would have been very helpful to the Tribunal to have had some evidence of that knowledge and some confirmation from the broker as to whether he was so aware and whether he continued to support the application. If such support had been forthcoming, it might very well have been appropriate for this Tribunal to have considered granting registration, imposing certain terms and conditions. But in the absence of the sponsoring broker, it is very difficult for the Tribunal to make such a consideration.

The other matter that must be dealt with is in respect to the question of charges which were laid and which have since been dropped. In themselves and in the evidence given by Mr. Galbraith, there was an indication that while he was not involved, he was unfortunately associating with persons who were involved and that causes concern. It's obviously something that the Applicant is going to have to address in his future endeavours.



It, therefore, appears to the Tribunal in considering the decisions which have gone before, particularly the Doherty (1989) 18 CRAT p.268 decision and the references to the cases cited therein, the most important responsibility of an Applicant is to be candid and disclose matters fully in his application for registration. Therefore, it is the opinion of this Tribunal that we are bound by the decision in Re: Brenner, a decision of the Divisional Court of Ontario heard March 9, 1983 and reported in 1971 - 1989 CRAT - Supreme Court of Ontario Decisions and Orders; that it is only with great reluctance that we can overturn the decision of the Registrar and only when we find that the Registrar did not act clearly or did not have facts clearly before him which would support his position. It is our view that the Registrar in his position as a protector of the public interest has acted properly in the circumstances and under that basis, we cannot overturn his decision.

In conclusion, I would like to suggest to Mr. Galbraith, having heard the comments from the Registrar, that the field is not entirely closed to him. The Tribunal itself cannot say that a particular period of time must elapse before further applications can be made and there are certain requirements which may have to be complied with, in respect to educational courses which Mr. Galbraith can review with the Registrar. But whether it is six months, a year, several years, if an application is submitted by Mr. Galbraith, he must bear in mind that he has these several obligations: first of all to deal with openness and honesty in his application; secondly, that he must be prepared to demonstrate to the Registrar that he has in fact turned over a new leaf, that he has good past conduct, which is a consideration which the Registrar has to look at. Under those circumstances, it is entirely possible registration may be permitted. While the door is not totally closed, there is a substantial obligation upon the Applicant.

Under the circumstances, however, on the facts of this particular case, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

## DAVID GRUNBERG

APPEAL FROM A PROPOSAL OF THE  
 REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
 TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
 TIBOR PHILIP GREGOR, Member  
 A. DONALD MANCHESTER, Member

APPEARANCES;  
 BERNARD N. MIDANIK, representing the Applicant  
 DON BOURGEOIS, representing the Registrar under the  
 Real Estate and Business Brokers Act

DATE OF  
 HEARING: 18 January 1990 Toronto

REASONS FOR DECISION AND ORDER

On February 22nd, 1989, David Grunberg (incorrectly referred to by the Registrar's Proposal as David Grundberg) applied for registration as a salesman under the Real Estate and Business Brokers Act; and his sponsoring broker was Murray Goldfinger Real Estate Ltd. of 718 Wilson Avenue in Toronto.

Joseph Kavanagh, a registration officer, met with Grunberg and Murray Goldfinger on March 31st to discuss Grunberg's three convictions: on January 13th, 1978 for public mischief arising from giving a wrong name to a police officer while being questioned about an automobile accident; on June 13th, 1980 for rape and in 1975 for careless driving, wherein he had his driver's licence suspended temporarily for an accumulation of demerit points. In a memo prepared from that meeting for the use of the Registrar, Kavanagh noted:

The charge of rape was as a result of he and his friend taking a girl to a public steam bath which was owned by his father he said that an argument occurred between him and the girl and he hit her after which he made love to her.

Further that Grunberg had been previously registered as a salesman under the Motor Vehicle Dealers Act from September 10th to December 17th, 1984, and that he was otherwise steadily self-

employed since 1980. No further submissions as to character or otherwise had been sent in by Grunberg after the interview.

Kavanagh acknowledged that registration would have been granted except for the serious conviction for rape. Marian Hetherington, another registration officer also attended at the interview. In Kavanagh's opinion, the eleven-old year rape conviction was of concern because such an action could be repeated and because it was a violent act which could be triggered by the kinds of pressures to which the real estate business may be subject.

Gordon Randall, the Registrar of the Real Estate and Business Brokers Act, has had more than twenty year's experience in all aspects of the business. He noted that the building of each Applicant's file is based on consistency and uniformity of treatment, as well as upon fairness and equity. The interviewing process, when required to deal with particular issues always has two registration officers present and the sponsoring broker is invited to attend with the Applicant.

The conviction for rape led to an eighteen month sentence for Grunberg who was paroled after serving six months. Since each registered salesman carries a pocket identification certificate, the Registrar is aware that access can be gained to premises where a woman may be home alone or to vacant premises with a woman client or co-worker. Since rape is a violent crime and there are many personal pressures in the business, the Registrar believes that both from an industry view and from public perception, a man convicted of rape would not be an appropriate person to have registered as a salesman; especially when knowledge of such a fact would come to the attention of clients or co-workers after some otherwise innocent visit to premises may have occurred.

In cross-examination, the Registrar acknowledged that eleven years had passed since the offence, that there was no further criminal record and that no lack of integrity had been shown by Grunberg in his other business operations thereafter. The Registrar noted that while Grunberg has made his living elsewhere, the standard of conduct in a regulated industry was to be of higher importance than it may be elsewhere.

David Grunberg was born in Russia on June 15th, 1956 and came to Canada when he was nine to live with his grandparents. His mother had disappeared and in 1959 his father came to join him. He took the real estate training course and completed the program satisfactorily. Further references had not been completed and sent in to the Registrar after his interview because a telephone call came to his wife from the Registrar's office announcing his

rejection, and he did not see the usefulness in completing those references.

Grunberg was open and forthcoming about the rape conviction, explaining that he was then twenty-one and that after his friend had intercourse with the young woman he sought oral sex from her and was refused, which led to some insults and blows. Both he and his friend were convicted since the woman had at least refused their advances during the event. While incarcerated at Brompton, he took counselling, completed various courses and was promptly released after six months. An appeal was not taken from the conviction due to lack of funds and his father lost the health club business and died in 1983.

He has had various jobs over the past ten years; as a salesman door-to-door, in various novelty businesses and as a long-distance truck driver. In some cases, his employer knew of his conviction, and in others he did not tell because he would likely have lost his current employment.

He acknowledged that his criminal record is a burden. A pardon has not been sought because both his neighbours in Whitby are policemen and any possible interviewing of them during a pardon application would be embarrassing. He has been married for three years to a registered nurse employed in a coronary care unit and they have two sons.

Out of some concern about his record, he has not been otherwise involved in community matters but has had no further problems since 1978, other than some parking fines.

In cross-examination, Grunberg agreed that he had lied or evaded telling former employers and business associates about his record, and he had not informed his present employer. He accepted that the Registrar has a duty in these matters and that public perception against his being registered was reasonable. He did question how he could be registered as a motor vehicle salesman just two years after his release from jail, but not be suitable as a real estate salesman almost ten years thereafter, when he was now mature, settled, with a family and had no other problems with the law.

Character evidence was presented on Grunberg's behalf by long time friends Albert Abergel and Moira Bendahan, and through four other letters. While Mr. Abergel believed that there is no possibility of problem reoccurring here, he did acknowledge that the Registrar has a duty on reasonable grounds to act, that integrity is very important and that public apprehension could occur among people who did not know Grunberg well and only knew of

the conviction for rape.

In his Proposal, the Registrar relies for his refusal to register Grunberg on Section 6(1)(b) of the Act which notes:

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

The Registrar's conclusions are set out in the Proposal as:

1. The intent and purport of the Act is to protect the public. The past conduct of the Applicant is inconsistent with the intent and purport to protect the public.
2. Every registrant under public protection legislation, such as the Act, is in a position of responsibility in the operation of the business.
3. Members of the public may be induced to believe that a registrant is fit and proper to deal with as a salesperson and that the salesperson had demonstrably complied with the Act by the mere fact of registration under the Act.
4. The Registrar is of the opinion that the past conduct of the Applicant, resulting in charges for serious offences and convictions under the Criminal Code, is sufficient evidence for the conclusion that the Applicant will not carry on business in accordance with law and with integrity and honesty.
5. The Registrar, based on the past conduct, is unable or unwilling to expose the public to the risks should the Applicant be registered.
6. The Registrar does not believe that a complaint, whether or not in respect of a trade in real estate or in respect to a matter under the Motor Vehicle Dealers Act, is necessary to the determination of the



Applicant's entitlement or disentitlement to register.

7. The Registrar believes that the burden of proof to be met by the Registrar has been met and is supported by the evidence and the preponderance thereof in discharge of his onus under subsection 6(1)(b) of the Act.

In this appeal, the Tribunal is to be guided by the principles as set out by the Ontario Divisional Court in the case of R.G. Brenner vs. Registrar of Motor Vehicle Dealers heard on March 9th, 1983 and unreported.

In that decision, Mr. Justice Southey wrote:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

And he further stated:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

In this appeal, the Registrar has decided to deny to Mr. Grunberg registration as a real estate salesman because of the conviction for rape, the fact of some violence having occurred, and the public perception of the duty of the Registrar to protect the public interest as well as the public concerns which could be expected to arise by the registering of such a convicted person. The matter of public perception through the registration of an individual has been considered by this Tribunal on several occasions. As set out in the appeal of Ronald W. Northover (1984) 13 CRAT 292:

...the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

We have also considered the comments of the Tribunal made in the appeal of Alexander Bodon (1984) 13 CRAT 247 at page 257 where it is stated:

But it seems to the Tribunal, that its function and that of the Registrar in the first instance, is not to punish. It is to protect. There are different species of misconduct which different individuals appear to possess propensities to commit thus setting other members of the public at risk. It is frequently necessary to put the interests of totally and absolutely innocent potential victims at an even higher level of consideration than those of an applicant for registration who, in

the criminal sense, has already been punished. This is not easy, especially when the individual the Tribunal sees before it is a palpable person while the ones protected from harm are anonymous members of the vast public at large whom one does not see as specific individuals. It is not easy and it should not be easy. We believe that no effort should be spared in any instance to examine and re-examine every possible way in which fair play and decent consideration can be assured to all the interests in any given problem situation with which the Registrar or later the Tribunal may be faced.

The decision of the Registrar is based on continued public perception of the Applicant's criminal conviction. There is no evidence that the Applicant would not carry on business in accordance with law and with integrity and honesty. However, due to the nature of the crime, it would be correct to assume that the Applicant would be continually vulnerable and, therefore, such vulnerability may lead to his inability to carry on business with law and with integrity and honesty.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

GEORGE WILLIAM GRUZUK

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
GORDON R. DRYDEN, Member  
JOSEPH STRUNG, Member

APPEARANCES;

GEORGE WILLIAM GRUZUK, appearing on his own behalf

ALVIN TORBIN, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 5 January 1990

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, George William Gruzuk, applied for registration as a salesman under the Real Estate and Business Brokers Act on April 29th, 1989. He had not been previously registered.

It appears that he had successfully passed his real estate course achieving 82% in his final examination. Previous to taking the course, he had been employed in pipeline construction which was largely seasonal employment. He has a wife who is employed and a child of five years of age.

Over the years, however, Gruzuk, had encountered some difficulties with the law resulting in four convictions in a period of nine years. They are as follows:

<u>Date &amp; Place</u>	<u>Charges</u>	<u>Disposition</u>
Feb. 27/77 Burk's Falls	Poss. of Narcotic drug	Conditional discharge & 9 mos.
Mar 16/81 Kenora	Poss of A Narcotic Sec 3(1)	Fined \$300. i/d 30 days

Jul 10/81 Burk's Falls	Theft under \$100. Sec 194(b) CC	Fin \$200. i/d 18 days & probation for 4 mos.
Apr 1/86 Sudbury	Poss of Narcotic Sec 3(1) NC Act	Fined \$100. i/d 30 days

These convictions are admitted in an agreed upon Statement of Facts submitted to the Tribunal entered into by the Applicant and counsel for the Registrar.

In his application for registration, Gruzuk admitted in answer to question 6 dealing with convictions that he had "In January 1985 been charged with possession of marijuana and fined \$100.00". There were no other convictions admitted.

On receipt of this information, the Registrar had a search made of the Applicant's history of convictions which disclosed the three previous offenses. As a result, the Registrar has issued a Proposal to refuse registration on the grounds that:

The past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Applicant now appeals from this Proposal.

As far as the Registrar is concerned, he contends he is entitled to look at the application as being a wholly truthful reflection of any applicant. He maintains that he should not be required to look beyond that since every applicant is expected to be completely honest in his disclosure. We are in agreement with that position and are supported by the many cases dealing with the issue.

In his defence, however, Mr. Gruzuk points out that although the previous convictions are now admitted, he was under the impression that after five years, they were wiped out - perhaps something similar to a pardon although he did not use that word.

He said he understood from a police officer, that after five years the records were sealed and that is why he did not disclose them. To a question of Mr. Torbin's, however, he acknowledged that he had not sought legal counsel on the point.



We are of the opinion that the Applicant's explanation for the omission of the three convictions is not unreasonable and having had the opportunity to weigh his evidence from the point of view of credibility, we are of the view that he is both forthright and believable. It is quite possible, if not probable, he classed his criminal convictions with those under the Highway Traffic Act which are expunged after a period of time. The fact of non-disclosure in Gruzuk's application was one of the grounds raised in the Registrar's Proposal to refuse registration. We do not find that is an issue since we believe the evidence of the Applicant.

The convictions, however, are another matter and raise the question we must invariably ask. What is to be expected in the future where there are four convictions in a span of nine years? It is neither the seriousness of each one, nor the frequency that trouble us so much as their cumulative effect and apparent tendency to be repeated. Counsel for the Registrar in his submissions observes that, "the continuing offenses pose the question of whether or not that type of behaviour will end". Of the many numerous decisions that he has submitted, the decision of Mr. Justice Southey in the case of Re: Brenner (so frequently quoted) direct us to the fundamental question:

The proper question at the rehearing remains, however whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Although this is a troubling application, the line is drawn by the Act and the number of authorities upon which not only we and the Registrar rely, but also a trusting and often gullible public. To quote from the Registrar's Proposal:

The intent and purport of the Act is clearly to protect the public interest.

That, of course, is the fundamental object of the Act and the decisions which have followed. They entirely support the conclusion of the Registrar to refuse registration at this time to the Applicant. We use the phrase "at this time" because the Applicant is not precluded from a further application at a later date when it may be viewed in a different light dependent on the conduct of the Applicant in the intervening months or years.

We cannot, however, but be critical of a system which permits a student in the real estate course to pursue his studies in the expectation that upon graduation, he will be gainfully employed in his chosen field only to learn that because of his previous conduct, the door has been closed even before he began to open it. Perhaps, upon the student's enrolment, if he has any convictions of any kind, it should be mandatory that these be immediately brought to the attention of the Registrar for a determination of his fitness to enter the field. That, however, is a matter not for this Tribunal, but for the legislators to consider.

In this matter, we are of the view that bound by the weight of the evidence and the latitude of the law, the Applicant's registration must be denied.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

CYNTHIA HAYES

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;

CYNTHIA HAYES, appearing on her own behalf

JANE WEARY, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 1 August 1990

Toronto

REASONS FOR DECISION AND ORDER

The Registrar's Proposal was based upon the fact that the Applicant first applied for registration as a salesperson under the Real Estate and Business Brokers Act on March 15, 1988. On December 19, 1988, the Commercial Registration Appeal Tribunal upheld the Registrar's Proposal to refuse the Applicant's registration. The third issue enunciated by the Registrar was that "insufficient time has passed between the Tribunal's decision of 1988 and the current application to demonstrate such rehabilitation that the Applicant's past conduct no longer affords reasonable grounds for belief that she will not carry on business in accordance with law and with honesty and integrity.

The primary decision of the Registrar given in his evidence before this Tribunal was based upon Ms. Hayes' failure to disclose criminal convictions in her application in 1988. Notwithstanding that the Applicant made full disclosure in her 1989 application for registration and identified that she had been granted a federal Pardon, the Registrar in his evidence before the Tribunal indicated that he was of the view that sufficient time had not yet passed to confirm rehabilitation.

In the 1988 decision of this Tribunal, the evidence indicated that there had been a number of criminal convictions during the period 1973 to 1982, but that there had been nothing since that time. Evidence had also been given in 1988 to explain the circumstances surrounding those criminal convictions.

Much greater concern was expressed in the fact that the Applicant had made two applications under the Motor Vehicle Dealers Act, one in 1974 and one in 1975, and that in neither of those applications had the Applicant divulged the information that she had criminal convictions.

Finally, in the application under the Real Estate and Business Brokers Act in 1988, there was again no reference to the specific criminal convictions. The Registrar in his evidence before this Tribunal indicated that this lack of disclosure produced reasonable grounds for belief that Ms. Hayes would not carry on business in accordance with the law and with honesty and with integrity.

In the 1988 hearing before the Commercial Registration Appeal Tribunal, Ms. Hayes had indicated to the Tribunal that her reason for not divulging the existence of the previous convictions in her application under the Real Estate and Business Brokers Act, was that she was of the belief that a Pardon was automatically granted after five years and, therefore, she had not thought it necessary to make reference to such convictions. In point of fact tendered in evidence before this Tribunal was the official Pardon which Ms. Hayes has since the date of the 1988 hearing before the Commercial Registration Appeal Tribunal obtained from the Government of Canada.

The Pardon stated:

AND this pardon is evidence of the fact that the Parole Board, after making proper inquiries, was satisfied that Cynthia HAYES...was of good behaviour and that the convictions should no longer reflect adversely on her character and, unless subsequently revoked, this pardon vacates the convictions in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which Cynthia HAYES...is, by reason of the convictions, subject by virtue of any Act of the Parliament or a regulation made thereunder.

This Pardon was issued March 2, 1989.

The wording in the Pardon follows the wording contained in Section 5 of the Criminal Records Act and, therefore, if Ms. Hayes were initiating an application under the Real Estate and Business Brokers Act, she would be entitled to respond in the

negative to Question 6 in the application: "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending?"

In addition to securing the Pardon, Ms. Hayes completed additional courses under the Real Estate and Business Brokers Act, and produced evidence before the Tribunal through Mr. Peter Blundell, her proposed employer, with regard to her current good character in the community in which she resides and in which she proposes to work.

While the Registrar was prepared to concede that perhaps a change has taken place in Ms. Hayes, he felt that some additional time should elapse before Ms. Hayes is granted registration. The Registrar indicated that, in his view, this amount of additional time might perhaps be another twelve months. This Tribunal, with the greatest respect for the decision of the Registrar, fails to comprehend whether the mere passage of time, whether it be a few months or a year, will change the state of affairs as they presently exist before the Tribunal given the determined and persistent efforts of Ms. Hayes and the community assessment of her character as indicated by Mr. Blundell.

The Tribunal clearly subscribes to the view expressed by the Divisional Court in **Re: Brenner** which, in addition to pointing out that the Tribunal should not lightly overturn a decision of the Registrar, also pointed out that an assessment of recent conduct perhaps as little as a year in duration, might far overrule previously bad conduct, and particularly, if there were reasonable explanations with regard to the convictions for which Brenner had been convicted.

In the case before the Tribunal, Ms. Hayes has clearly demonstrated a substantive change through her obtaining of the Pardon and her determined approach in applying for a career in real estate. This Tribunal is of the view that a further period of time is not required and on that basis, the application of Ms. Hayes should be granted.

In the course of the hearing before the Tribunal, argument was presented by counsel on behalf of the Registrar, that notwithstanding the Pardon, the evidence of previous convictions on file with the Ministry could be reviewed in determining Ms. Hayes' past conduct for the purpose of granting her application to be registered as a salesperson under the Real Estate and Business Brokers Act.

An opinion was submitted to the Tribunal that indicated that the effect of the federal Pardon was simply to put aside in



federal jurisdiction those criminal records and not make them accessible so long as the Pardon remained in full and force and effect.

The argument advanced by counsel on behalf of the Registrar was that this had no application whatsoever to records which were on file with a Provincial ministry. While the Tribunal has no quarrel with this proposition, the Tribunal does have some concern as to the amount of weight which may be given to the existence of such records on a file in the Registrar's office.

In the particular case of Ms. Hayes, we have the anomaly that if Ms. Hayes had made application for the first time, only after having obtained her pardon, there would be no reference to previous criminal convictions. In Ms. Hayes' case, however, having applied prior to her having obtained a Pardon the evidence of her previous criminal convictions was available to the Registrar. There is in the view of this Tribunal a concern as to the amount of weight which may be given to such material on the file of the Registrar.

In particular, the Tribunal is of the view that Section 15 of the Canadian Charter of Rights which provides that, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination..." is applicable and, therefore, in a case such as this where a pardon has been granted, substantial consideration should be given by the Registrar to that pardon at least insofar as it pertains to the convictions themselves. Only by so doing can the anomaly identified herein be corrected.

Although the Tribunal has dealt with the argument advanced with respect to the effect of the granting of the Pardon, it was not necessary for the Tribunal to deal with this issue in determining the matter in this case, because the Tribunal is satisfied on the basis of the facts presented to the Tribunal concerning the most recent conduct of Ms. Hayes, together with the evidence of the Registrar that Ms. Hayes is now entitled to be registered as a salesperson under the Act.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal and to grant the application of Cynthia Hayes as a salesperson under the Real Estate and Business Brokers Act.

ALFRED JOSEPH HUTTER and  
RE/MAX CLASSIC REALTY INC.

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO RENEW THE REGISTRATIONS

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding  
J. BEVERLEY HOWSON, Member  
MARGARET MEINDL, Member

APPEARANCES;

ALFRED JOSEPH HUTTER, appearing on his own behalf  
and as agent for Re/Max Classic Realty Inc.

JANE WEARY, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 19 March 1990 (comm.)

Kitchener

REASONS FOR DECISION AND ORDER

Alfred Joseph Hutter was registered as a real estate broker with Waterloo Realty Inc. from June 25, 1987 to December 30, 1987 and after a change of name of that revived company as Re/Max Classic Realty Inc. from December 30, 1987 to the present. Mr. Hutter was and is the sole officer, director and shareholder of the company as he was of the earlier Waterloo Realty Inc., which had existed from January 6, 1977 to its earlier dissolution on January 17, 1983.

The Proposal of the Registrar is to refuse to renew both the registrations of Mr. Hutter and of Re/Max Classic Realty Inc. as of June 25, 1989 and May 24, 1989 respectively.

Mr. Hutter sought an adjournment of this hearing because his files had been seized some eleven months ago and were being held; so that he could not prepare his defence. He had been sent all the 142 pages of materials on which the counsel for the Registrar would rely by hand delivery and by registered mail, as well as in part by fax with at least five days to consider the material, all of which came from his own files. The Proposal was dated August 21, 1989 and Hutter had been told that he could attend in Toronto to make photocopies of any items he wished. Since his records were seized under a Criminal Code warrant, they would not be returned until after a trial later this year.

The Tribunal decided to proceed with this hearing as adequate and timely disclosure had been made of the Registrar's material. While the Registrar wishes to refuse to renew both Hutter's personal registration and that of his corporation, Hutter agreed that he had, in effect, surrendered any corporate registration by being the sole broker of that corporation and then transferring to another office as an associate Real Estate broker. Accordingly, since no evidence will need to be called about the corporate situation, the Tribunal will order that such registration not be renewed.

On March 16, 1989, Jane Wilkins, a regional officer visited Hutter's office to do a routine inspection of records. She saw an office with little furniture, no one at the front desk and rooms empty of staff and clients. Hutter's general account had an overdraft of \$3,633.86 and there was \$3,497.27 in his trust account when there should have been \$3,500.00. Among Hutter's records was a stack of eight or ten bank statements in unopened envelopes.

The sale of 560 - 564 Brookhaven Crescent, in Waterloo was shown as "Trade 24". While \$2,000.00 was deposited on September 30, 1988 and \$8,000.00 was deposited on October 14, 1988 and while the transaction was to and did close on February 1, 1989, there was a balance in Hutter's trust account of only \$344.49 as of December 21, 1989.

For the property of 30 Dunham Street in Kitchener, known as "Trade 26", Ms. Wilkins noted that the trust monies on deposit were disbursed from the Trust account on October 28, 1988 although the transaction did in fact close as scheduled on November 30, 1988.

She further noted that a cheque was written against the Trust account on October 28, 1988 in the amount of \$6,120.00. No trade could be found to relate to the withdrawal. Hutter informed her that this was a commission cheque taken out of the trust account in error, but the monies have not been returned to the Trust Account since the inspection of March 16, 1989.

Ms. Wilkins issued a 3-page Deficiency Notice to Hutter, cautioned him about premature Trust transfers and recommended to the Registrar that a full credit search be done and the bank accounts be frozen.

In reply, Hutter said that "Trade 26" had its closing date extended to November 30, so the transfer out on October 28 was just a computer error. Ms. Wilkins responded that there was no extension noted in the file she saw.

Gary John Thompson is an investigator with the Business Practices Division of the Ministry. On March 22, 1989, he obtained a search warrant under the Criminal Code and seized the business records of Re/Max Classic Realty Inc. Directions were issued on the same day to freeze the two Trust accounts of the corporation and a further one was issued on April 4, 1989 to freeze the general account of the corporation.

Mr. Thompson reviewed the documentation for Trades 20, 24, 26, 31 and 32. In these files, funds were transferred from a Trust account to the General account before closing dates or transfers were made without reference to an actual trade. In each case, balances in the Trust account were less than the total should have been on particular days shown on the various bank statements.

Vic Vandermolen, the Executive Director of the Kitchener-Waterloo Real Estate Board, gave evidence to the Tribunal that complaints had been received about non-payment of shares of commissions to agents, and about non-payment of salaries to staff of Re/Max Classic Realty Inc. As well, invoices for membership dues and supplies were habitually paid late and the balance owed for December 1989 of \$884.65 is outstanding since the cheque sent for payment was returned marked "NSF".

Jill Basingdale is the Vice-President, Administration of Re/Max Ontario-Atlantic Canada Inc. which terminated the franchise of Re/Max Classic Realty Inc. on March 23, 1989. She reported that the franchise agreement had been broken because the corporation was not a member of the local Real Estate Board, there were not the required seven sales staff, standards were not being maintained and the volume of trades was not kept up. A Consent Order obtained on February 15, 1990 in the Supreme Court of Ontario required Re/Max Classic Realty Inc. to be restrained from using the designation "Re/Max", but the corporation continues to operate under the "Re/Max" name.

The evidence of Lou Klarke, a Re/Max broker in Kitchener was that former staff of Hutter were hired by him and had to pay fees to the Re/Max franchiser which they said they had paid earlier to Hutter, who apparently did not remit them.

The evidence of Harjit Mangat, a real estate broker in Kitchener, was that a one-half share of commission on the Trade 24 referred to earlier was not paid by Hutter. Of \$8,250.00, only \$500.00 was sent and various excuses were made, but Mangat did not begin an action to recover the funds since the costs would make it just a further expense.



Finally, Wayne Lefebvre reported on the details of Trades 31 and 32 which included two deposits of \$500.00 each for a property and a business. Conditions in the Offers were not met by the vendor. If met, a further deposit of \$4,500.00 was to be made. The deposits have not been returned and without explanation, Hutter drew a cheque on the corporate Trust account for \$4,500.00 with reference to this Trade although that money had never been specifically paid into the account by Lefebvre.

Gordon Randall, the Registrar of Real Estate and Business Brokers, reviewed the history of Waterloo Realty Inc., including certain consumer complaints, problems over a mortgage broker fee and certain outstanding judgements. In his view, the facts of the bank statements show early withdrawals, the taking of the Lefebvre \$4,500.00 which was not deposited initially and much lesser balances in trust on certain dates than should have been there.

Other brokers are owed commissions, staff are owed fees, claims have been made to the Ontario Real Estate Association recovery fund and both Hutter and Re/Max Classic Realty Inc. are not members in good standing of the Kitchener-Waterloo Real Estate Board.

In the Registrar's view, the facts of being licensed, having a pocket identification certificate and having an office and sign gives the public a belief in the credibility of the monitoring system and a reliance on the high standards which are expected. The Registrar confirmed that Hutter had a transfer recorded on March 12, 1990 to Frank Lipniki Real Estate which left Re/Max Classic Realty Inc. without any staff registrants.

In the Registrar's view, all of the questionable financial actions were knowingly done by Hutter as the sole officer, director and shareholder of Re/Max Classic Realty Inc.

The Registrar bases the refusal to renew both registrations on the following four grounds as set out in subsections (b), (c)(i), (c)(ii) and (d) of Section 6(1) of the Real Estate and Business Brokers Act respectively:

- a) the past conduct of the Registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and
- b) the Corporation cannot reasonably be expected to be financially responsible in the conduct of its business; and



- c) the past conduct of the Corporation's sole officer and director affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.
- d) the Registrant and Corporation are carrying on activities that are in contravention of the Regulations.

The Registrar submits that the breaches of trust in removing funds from the corporate trust account have been met by Hutter with no remorse and no admissions of wrongdoing.

In support of his position, counsel for the Registrar referred to the decisions of Alexander Bodon (1984) 13 CRAT 247, and Larry I. Kleinmintz (1989) issued on August 23, 1989.

The duty of the Registrar to protect the public interest in trust account matters is reviewed in the Bodon decision beginning on page 257 where it is written:

But it seems to the Tribunal, that its function and that of the Registrar in the first instance, is not to punish. It is to protect. There are different species of conduct which different individuals appear to possess propensities to commit thus setting other members of the public at risk. It is frequently necessary to put the interests of totally and absolutely innocent potential victims at an even higher level of consideration than those of an applicant for registration who, in the criminal sense, had already been punished. This is not easy, especially when the individual the Tribunal sees before it is a palpable person while the ones protected from harm are anonymous members of the vast public at large whom one does not see as specific individuals. It is not easy and it should not be easy. We believe that no effort should be spared in any instance to examine and re-examine every possible way in which fair play and decent consideration can be assured to all the interests in any given problem situation with which the Registrar or later the Tribunal may be faced.

However, in a line of decided cases the Tribunal has clearly stated its belief in the supremacy of the public interest as well as the supreme importance it places upon the principle that members of the public must perceive with confidence that regulated industries are conducted by honest men and women in a strictly honest way.

In his response, Hutter claimed that no funds had ever been improperly diverted and that he should be allowed to continue as a salesman. His remorse was shown in the blow of closing his own office because he could not pay the bills to keep it open. He stated that he did not know to whom any trust account monies might be owed as there were no consumer complaints concerning such funds. In his view, there must be many credits from his 36 other files still in custody. Of the almost \$3,500.00 in trust, he stated that \$1,000.00 is the Lefebvre deposit, \$2,000.00 is for Trade 41 which is closed and \$500.00 for Trade 42 which is closed.

Hutter would seek conditions to remain as a salesman and have the right to return as a broker in some years without a further review. After seventeen years in real estate, he believes that some bookkeeping errors have occurred, but he wants to continue in this only work experience which he has had since leaving university. Because of financial pressures, he has lost his house and is separated from his wife and children.

The Tribunal has seriously considered the evidence presented by the Registrar and by the witnesses in support of the Registrar. Since the Registrar has made out by the evidence that he has reached conclusions sufficient to fulfil the onus on him under Section 6 of the Real Estate and Business Brokers Act, the Tribunal cannot say that the Registrar has erred and that his conclusions are unreasonable.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

INNOVATIVE VENTURES CORP.  
and ROBERT A. BROWN

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT THE REGISTRATIONS

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding  
GORDON R. DRYDEN, Vice-Chairman as Member  
HARRY HAYES, Member

APPEARANCES:

ROBERT A. BROWN, its agent  
and on his own behalf

GAIL MIDANIK, representing the Registrar under  
the Real Estate and Business Brokers Act

DATE OF  
HEARING:

5 September 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Robert Brown and Innovative Ventures Corp. from the Proposal of the Registrar, Real Estate and Business Brokers Act, to refuse to grant them registration as real estate brokers.

Brown was previously registered under the Act, first as a salesman, and later as a broker, commencing in July, 1976, and, subject to intermittent interruptions, terminating on August 21, 1987. Innovative Ventures Corp. is wholly owned and run by Mr. Brown. The company has undergone a series of name changes. It was previously registered under the Act as Centrovincial Realty Ltd. from July, 29, 1980, to June 22, 1985, and under the name Innovative Realty Corp. from August 21, 1985, to August 21, 1987, when its registration terminated.

The Tribunal heard the evidence of Mr. Gary Thompson, who is an investigator with the Ministry of Consumer and Commercial Relations. On or about May 18, 1988, Mr. Thompson received a complaint about Mr. Brown from Mr. Louis Zupancic. Mr. Zupancic had responded to a newspaper advertisement placed by Mr. Brown seeking income producing properties. This led to Mr. Zupancic meeting with Mr. Brown and entering into an "Employment Agreement" with Innovative Realty Corp. The agreement gave Innovative Realty Corp. the sole and exclusive authority to offer for sale Mr.

Zupancic's property at 1 Main Street, Alton. This agreement, executed April 16, 1988, by Mr. Zupancic and by Robert Brown for Innovative Realty Corp. is in all respects, save for its title, an exclusive listing agreement. Subsequently, Mr. Zupancic became dissatisfied with the performance of Innovative and Mr. Brown, and made the complaint to Mr. Thompson.

Mr. Thompson investigated the complaint and discovered that neither Innovative nor Mr. Brown were registered under the Act. Although Mr. Thompson was unable to locate the specific advertisement that Mr. Zupancic had seen, Mr. Brown readily admitted in his own testimony that he did place the advertisement to which Mr. Zupancic responded, and did execute the "Employment Agreement".

Mr. Thompson did locate another advertisement which Mr. Brown placed in the Toronto Star on December 11, 1987. That advertisement read "King-Spadina various sizes studio/office. Immed. Reasonable. Well managed bldgs. Other locations avail. Innovative Realty Corp. Bkr. (phone number)". Again, Mr. Brown freely admitted that he placed this advertisement as well.

Mr. Thompson laid charges against both Mr. Brown and Innovative Realty Corp. under Section 50(1)(c) of the Real Estate and Business Brokers Act, including one count each of trading in real estate as a broker without being registered under the Act, arising out of the Zupancic complaint, and one count each of holding themselves out as being brokers when neither were registered as brokers, arising out of the Toronto Star advertisement in December, 1987.

Mr. Thompson encountered some difficulty in serving Mr. Brown with the summons since Mr. Brown was at the time out of town a great deal. Eventually a meeting at the Registrar's office was arranged for January 12, 1989, and Mr. Thompson served Mr. Brown with the summons at the Registrar's office on that date.

On February 1, 1989, Innovative Realty pleaded guilty to both counts and was fined \$1000.00 on each count. Robert Brown also pleaded guilty to both counts and was fined \$250.00 on each count. On February 20, 1989, Brown filed an appeal on his own behalf and on behalf of Innovative Realty Corp. seeking a reduction of the fines on the grounds that "The Appellants have not been engaged in their usual line of business for the past 18 months and consequently do not have sufficient income or financial resources to afford payment of the fine." This appeal was later discontinued.



The Tribunal next heard from Mr. Paul Daoust, who is a Consumer Services Officer at the Ministry of Consumer and Commercial Relations. His duties include conducting searches of various public records at the request of the Registrar's office. Between January, 1990 and May, 1990, Mr. Daoust conducted records searches in respect of Robert Brown and Innovative Realty Corp., including, inter alia, searches of the records of the Sheriff for the Judicial District of York, the Provincial Court Office, and the Companies Branch. He also searched Mr. Brown's driver's record. Mr. Daoust indicated that at the time he conducted his searches, the fines imposed on February 1, 1989 remained unpaid. His searches also revealed an outstanding judgment against Mr. Brown and against Memory Lane Realty Corporation (another of Mr. Brown's companies) dated October 16, 1987 and filed November 12, 1987, in the amount of \$1,545.45 plus costs and pre-judgment interest. Another judgment was filed April 8, 1987, against R.A.B. Realty Investments Corp., yet another of Mr. Brown's companies, in the sum of \$2,196.65, plus costs. A Mr. Brown's driver's record disclosed numerous convictions and two suspensions, in 1981 and in 1988, arising out of unpaid fines.

Marion Hetherington is a registration officer with the Registrar's office. She was present at the meeting with Mr. Brown on January 12, 1989. During the course of that meeting, the subject of Mr. Brown's business address arose. Mr. Brown was utilizing a post office box at 2 Bloor Street West, Toronto as his business address.

Mr. Brown was advised at that meeting that the Registrar required registrants to maintain a physical business premises where their consumer clients could have access to the brokerage during regular business hours. Mr. Brown indicated that, although he would prefer to continue using the 2 Bloor Street address because it gave a better impression to his clients or potential clients, he would be prepared to comply with this requirement.

Ms. Hetherington also questioned Mr. Brown as to any unpaid judgments owing. Mr. Brown did not indicate any judgments but did indicate that he was indebted to the Royal Bank. Mr. Brown stated that he would pay this debt after he was registered. A later credit check conducted by Ms. Hetherington disclosed that Mr. Brown had a credit limit of \$3,000.00 at the Royal Bank and was indebted to that Bank for \$4,135.00, with no payments since July, 1987.

The two applications for registration, one made by Mr. Brown on his own behalf and the other on behalf of Innovative Ventures Corp. are dated February 6, 1989, and signed by Robert Brown. Question 6 of the application form reads "Are there any unpaid judgements outstanding against the applicant?" This



question was answered in the negative on both applications, although at the time there was, in fact, an unpaid judgement outstanding against Robert Brown.

Mr. Randall, the Registrar, testified that Mr. Brown was very co-operative throughout his dealing with him. The meeting on January 12, 1989, was held at Mr. Brown's request, prior to the applications for registration being submitted. Mr. Randall testified that he has serious concerns about Mr. Brown's financial circumstances. Mr. Brown has been unable to pay the fines that were levied against him and Innovative, is indebted to the Royal Bank over his credit limit, and has unpaid judgement outstanding against him personally.

Mr. Randall also expressed a serious concern as to Mr. Brown's honesty and integrity in view of the fact that he failed to disclose the judgement on his application for registration, particularly in view of the fact that Mr. Brown had a prior lengthy registration and would therefore have been very familiar with the form of application. Furthermore, Mr. Brown had been convicted of trading in real estate without being registered and holding himself out to be a broker when he was not registered, as had the corporate applicant. These were not viewed by Mr. Randall as "minor" matters, particularly since Mr. Brown did have a prior lengthy registration and was well aware of the requirements for registration. Mr. Brown was well aware that what he was doing was illegal.

In conclusion, Mr. Randall testified that in his opinion Mr. Brown and his company were precluded from registration under the Act, as neither could reasonably be expected to be financially responsible in the conduct of their business, and as Mr. Brown's past conduct affords reasonable grounds for belief that his business, and that of his company Innovative, will not be carried on in accordance with law and with integrity and honesty.

In his defence, Mr. Brown testified that the "Employment Agreement" that he utilized in the Zupancic incident was a document prepared for him by a firm of solicitors and which he had used during the period that he was registered under the Act. He stressed that he had not "concocted" it in an attempt to circumvent the Act. With respect to his failure to disclose the unpaid judgement outstanding against him on his application form, Mr. Brown's explanation was that he did not know how to search for judgements. He testified that he had attended at the Credit Bureau and conducted a search but no judgements turned up. He admitted that he was aware that he had been sued by the judgement creditors, but had moved to British Columbia at the time of the lawsuit and had not done anything to defend against it. He had sold the Memory

Lane company to another party. He later obtained his own judgment against that party since that party had agreed to assume all of the liabilities of Memory Lane Realty Corp.

As to the reasons why he had traded without being registered and held himself out as a broker when he was not registered, Mr. Brown said that he "wasn't ready" to go back to being a broker at the time he committed the offences that he was convicted of. He stated that he was fully aware at the time that he was infringing the Act and that he was troubled by what he was doing. Mr. Brown attributed his troubles with Mr. Zupancic to Mr. Zupancic's volatile temperament.

Mr. Brown then disclosed that he is at the present time advertising for income producing properties in the Toronto Star. He pointed out that he is doing so "as a principal, not as a broker". He proudly stated that he had recently put in an offer that had been accepted on a \$5.4 million property with no deposit, utilizing a "creative" form of agreement. He now intends to look for a group to "syndicate" the property to, or a buyer to "flip" it to. Mr. Brown explained that he has little money at his disposal, just enough to live on and he therefore has to be creative.

In Re: Brenner, a 1983 decision of the Divisional Court of Ontario the principle was established that this Tribunal should interfere with the proposal of the responsible Registrar only if it thought that the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that the applicant would not carry on business with law and with integrity and honesty. One can also extrapolate from the Court's reasoning that where the grounds for refusal related to the applicant's financial position, the Tribunal should only interfere if of the view that the Registrar was in error in concluding that the applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

The Tribunal has considered all of the evidence before it and finds that it cannot find the Registrar's conclusions under either branch of Section 6 of the Act to be in error. Rather the Tribunal accepts and ratifies those conclusions. Mr. Brown has failed to produce one iota of evidence that would demonstrate that his financial position, or his company's financial position is such that he can be reasonably expected to be financially responsible in the future. He has not indicated any intention to pay the outstanding fines or judgments or the debt to the Royal Bank. Rather he has shown that he is more than willing to enter into transactions that are totally beyond his means on the gamble that

he will be able to find a buyer at a higher price prior to the closing date.

The fact that he has been "creative" enough to leave himself a legal escape hatch does not leave the Tribunal with a better impression of financial responsibility. It is not for the Tribunal to determine today as to whether Mr. Brown's current activities amount to trading in real estate without being registered under the Act. Rather this is something for the Registrar to take under consideration.

Similarly, the Tribunal finds that the past conduct of Mr. Brown certainly affords reasonable grounds for the belief that his business and Innovative's business will not be carried on in accordance with law and with integrity and honesty. Without restating the evidence again, Mr. Brown's past convictions under the Act, his admission that he committed these offences with full knowledge of their illegality, and his failure to disclose the unpaid judgement against him on the application form all provide such reasonable grounds.

In result, the Tribunal by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act directs the Registrar to carry out his Proposal to refuse registration to both Applicants.

ALIN KADER

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding  
GORDON R. DRYDEN, Member  
SADIE MORANIS, Member

APPEARANCES;

ERIC P. POLTEN, representing the Applicant

GAIL MIDANIK, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 4 May 1990

Toronto

REASONS FOR DECISION AND ORDER

Alin Kader was first registered as a real estate salesman for the two years commencing April 26, 1985. On his failure to renew, he was terminated by the Registrar, but on application was reinstated on June 1, 1987. As a result of certain complaints with respect to not advising a vendor that some deposit cheques had been returned "NSF", the Registrar proposed on October 30, 1987, to revoke Kader's registration. Upon appealing to this Tribunal, the matter was resolved by a Consent Order suspending his registration for three months commencing May 2, 1988. Upon failing to renew his registration, Kader was again terminated by the Registrar on April 26, 1987.

Kader again applied for registration on May 17, 1989, but upon the withdrawal of his sponsorship by his employer, the application lapsed. In that application, Kader had answered Question 6 by placing a check mark in the "No" box.

Question 6 is as follows:

Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

NOTE: Where the applicant has been previously registered, list only

those convictions which have occurred since the date of last filing.

Kader applied again on July 28, 1989, again with the same sponsor as before, and he answered Question 6 this time by placing a check in the "Yes" box. As before, the application was written up by the sponsoring broker, Mr. Al Cunningham. Attached to this application was a 7-page outline of certain criminal charges with respect to an alleged sexual assault of a young woman in 1987, and the previous consent to the three month suspension by the Registrar.

The Registrar proposed to refuse registration to Kader in a Notice dated December 5, 1989; which refusal was based on Section 6(1)(b) of the Real Estate and Business Brokers Act in that:

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

The Registrar cited particulars of the termination of the first registration; the three-month suspension which led again to termination; the re-application of May 18, 1989 with the incorrect answer to Question 6 and the following meeting with the Registrar's staff and the withdrawal of Mr. Cunningham's sponsorship; and finally, the application of July 28, 1989 received on August 21, 1989 with the renewed sponsorship of Mr. Cunningham and the detailed answers to the corrected Question 6.

In the Notice of Proposal to refuse registration, the Registrar noted:

- 32. Up until the meeting of June 22, 1989, Kader did not disclose the pending charges nor volunteer any information about the charges. He did not disclose the pending charges in his May 1989 application. He only did so when confronted by the Registrar, and in his subsequent application of August 1989.

While reference is made to the matter of the three month suspension, the Registrar's real reason for refusing registration



is because of Kader's failure to answer Question 6 correctly and disclose in the application of May 17, 1989 received the next day, the pending criminal charges laid in July 1988 after which a pre-trial hearing was to occur on October 19, 1989 with a trial expected in the Spring of 1990. These details were included in Kader's application of July 26, 1989.

Ms. Marion Hetherington is a registration officer who, when reviewing the application of May 18, 1989, obtained a Director's Certificate as to previous registration since Question 3 pertaining thereto had been answered affirmatively. Upon checking on the "No" answer to Question 6, she discovered the criminal charges and informed the Registrar.

Kader was invited to attend at the Registrar's office with Mr. Al Cunningham, his sponsoring broker and the meeting took place on June 22, 1989, which also included Fred Cam, an investigator.

Kader acknowledged the application which had been written up by Cunningham. Upon the criminal matters being raised, the Registrar joined the meeting.

Kader stated that disclosure had not occurred due to his failure to understand the word "pending". With Kader's admitted knowledge of six languages and high mark on his real estate course, that answer was suspect.

Cunningham did not know of the charges and the meeting ended with Cunningham stating that he would likely withdraw sponsorship for Kader. A letter to that effect was sent in on June 22 by Cunningham. On August 21, a new application was received dated July 28, 1989, showing Cunningham as the sponsor and with the attached memo as set out above.

The Proposal to refuse registration was made on December 5, 1989; some three and one-half months later.

Fred Cam has been an investigator with the Ministry since August 1987 and, in his evidence, confirmed the events of June 22, 1989. In his view, the questions were clear and had been readily understood by Kader. He agreed that Kader had said the accusations were false and he would be found innocent of them without question.

Kader was subsequently charged under Section 50(1)(a) of the Real Estate and Business Brokers Act with providing a false answer and that matter will be heard on July 10, 1990.

Gordon Randall, the Registrar, reviewed the facts of this matter as set out so far. In his view, the matter of a false answer is most serious since complete reliance on accurate answers has to be the rule. Especially a false answer to Question 6 is of great consequence.

Accurate completion of the registration form is discussed in the first three hours of the first part of the real estate course and is always given much importance. This is repeated on the first day of the second part of the course.

In the Registrar's view, such a serious matter as the criminal charge as set out, could not have just been forgotten by Kader. In addition, Kader was renewing his application so that the document was not strange to him.

Al Cunningham is a former Metro Toronto policeman, who is now the owner-broker of NRS Brampton Realty Inc., and who, for the past year, has been in a residential business operation with thirty-four realtors and four staff members. While he knew of Kader, they first met on May 17, 1989 when Kader sought a salesman's position. Cunningham agreed that he had filled out the application form as is his practise, with Kader signing it afterwards. In their 15-minute meeting, the previous suspension was disclosed but nothing was said by Kader of the criminal charges.

In the second application, Kader provided the seven page addendum and Cunningham reviewed his decision not to sponsor Kader; because of Kader's real estate experience, his articulate presentation and his obvious intelligence. If Kader returns to Grand Valley from London, he would be within 45 minutes travel to the office, which is a practical arrangement. Cunningham agreed that his own signature does certify the answers on the application, and that honesty and ethics in the real estate business are important. He also noted that Kader had without hesitation information for the Question 3 previous registration and that the application form would be familiar to Kader.

Kader had explained the criminal charges to Cunningham and that the charges may not have been properly made out, and that in any event, he was innocent of such charges. Cunningham agreed that the failure to answer Question 6 correctly showed a lack of honesty and integrity.

Alin Kader, 50, came to Paris from Tunisia in 1959 and while in Europe learned six languages. He came to Canada in 1966 and became a citizen in 1976. He began his real estate career in

1985 after successful completion of the 3-part training course. His wife is of Swiss-German heritage and they have five children.

Kader did not recall really looking at the first application form made out by Al Cunningham, but just recalled a quick recital of the questions and a prompt response to them as asked. At the time of the second application, Kader had considered the meaning of "pending" and while he believed himself not guilty of any such charges, he gave more information and a correct answer.

Kader had a good earlier career in real estate and will sell his London home to return to Grand Valley where he can be active in Cunningham's real estate office. While Kader admits to being a bit naive, he said that he had no convictions for any matters either in Tunisia, France or Switzerland.

Under cross-examination, Kader said that he had not routinely renewed his licence in June 1989 due to his moving and that any renewal notice had not come out to him. Since Kader was not a criminal in his own mind, his answer to Question 6 was hasty since the word "pending" was not clearly understood.

Counsel for the Registrar referred the Tribunal to the decision of Patrick A. Doherty (1989) 18 CRAT 268, and to the references to other decisions contained therein: particularly Brenner (1989) 19 CRAT 58; Gilford Garage (1982) 11 CRAT 52; Peter Kodis (1985) 14 CRAT 187.

In addition, she referred the Tribunal to the decision of Alexander Bodon (1984) 13 CRAT 247 and Maureen Ford (1989) 18 CRAT 281.

While others may not disclose information and still become registered, the failure to disclose is a specific matter for Kader. The Registrar requires only reasonable grounds for his decision and so long as he has them, it is the duty of the Tribunal to uphold the Registrar. The disclosure matter is vital to the whole system, and the application form becomes a test of ethics which Kader did not pass. Kader has been registered before, he has twelve years business experience and is a linguist; so his excuse of not understanding is not acceptable.

In reply, counsel for Kader referred to the decision of David S. Leonard (1985) 14 CRAT 96, where the Tribunal in its discretion allowed registration; and also the decision of Thomas Joseph Peotto (1986) 15 CRAT 207, where it was stated at page 210:

A false statement or a non-disclosure in  
a application is a very serious matter from

which it can be easily inferred that the Applicant will not carry on business with integrity and honesty. However, as stated by the Tribunal in the Coniam (1983 CRAT. 60) and Leonard (1985 CRAT 96) decisions, non-disclosure and falsehood in an application does not ipso facto lead to such a conclusion, nor does it automatically lead to disentitlement; there is still the exercise of judgment with respect thereto.

In that case, again discretion was used to renew the registration on terms of supervision as an employee.

He also cited definitions of the word "pending" in Webster's Encyclopedia at page 1065 and in Black's Law Dictionary (1979) at page 1021. In his view, the obvious failure to disclose does not mean the lack of integrity or honesty. He suggested that Kader has suffered considerably because of these events, and is very good at his work as a realtor so that that should be taken into account by the Tribunal.

He also suggested that certain terms and conditions would be appropriate in this instance in that Kader could remain only in one person's employ and if found guilty of the criminal charges, his registration could be rescinded.

During the deliberations to reach the decision of the Tribunal, information was received with respect to the acquittal of Mr Kader on the charge of sexual assault on June 4, 1990 in the District Court of Ontario before his Honour Judge Rogers sitting in the Judicial District of Peel at Brampton.

The Tribunal has come to the conclusion that the circumstances in this application are, in effect, similar to those in the matter of Patrick A. Doherty which has been referred to above. In that decision, the Tribunal said:

However, because he is on probation and has serious criminal charges to face and because he did not disclose on his application, these and other matters to the Registrar, this Tribunal cannot say that the Registrar is incorrect in refusing registration at this time. Mr. Doherty can re-apply for registration in several months when a full disclosure of his then

current circumstances may lead to a different view by the Registrar.

In the matter before the Tribunal, we have concluded that again we cannot say that the Registrar is incorrect in refusing registration renewal at this time to Mr. Kader. Mr. Kader can re-apply for registration after the passage of some time when a full disclosure of his circumstances then may lead to a different view by the Registrar as to his registration as a real estate salesman.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.



LARRY I. KLEINMINTZ

APPEAL FROM A DECISION OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
SADIE MORANIS, Member

APPEARANCES;  
BENJAMIN SALSBERG, representing the Applicant  
ALVIN TORBIN, representing the Registrar under the  
Real Estate and Business Brokers Act

DATES OF 12, 13, 14, 15, 16, December 1988  
HEARING: 3, 5, 6, 10, 14 April 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse to grant the registration of the Applicant, Larry I. Kleinmintz, as a real estate salesman. The reasons given by the Registrar for his Proposal are:

(a) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and

(b) having regard to his financial position, the Applicant cannot be expected to be financially responsible in the conduct of his business..

The facts are as follows:

1. At all times, Kleinmintz, the Applicant, was the principal of 314347 Ontario Limited, being its sole shareholder, director and officer. The company was incorporated on November 1st, 1976 and was registered as a travel wholesaler under the Travel Industry Act. The company carried on business under the name of "Talk Tours" for the wholesale side of its business operations and "Talk Travel and Tours" for the retail side.

2. On August 31st, 1985, the company voluntarily terminated its registration; at that time, there were a certain number of unsatisfied judgements against the company.

3. Prior to its termination of business, the inspector designated under the Travel Industry Act found that the company had serious working capital deficiencies. These deficiencies began in 1983 and continued to the date of termination of the registration.

4. From the end of October 1983 onward, the company was asked to deposit sufficient monies to eliminate the working capital deficiency; however, as at the date of the termination of its registration, the company's working capital deficiency amounted to \$60,291.

5. At the same time as the company was surrendering its registration, the Applicant became sole shareholder of a number of other companies in whose favour the assets of the original company were rolled over. More particularly, the Applicant became the sole shareholder, director and officer of 632000 Ontario Limited which was incorporated on July 15th, 1985, and was registered (retail) under the Travel Industry Act on August 15th, 1985.

6. At the same time, the Applicant registered 632001 Ontario Limited (wholesale) under the Travel Industry Act. Again, he was the sole shareholder, director and officer.

7. From the time of their incorporations, the inspector determined that each had ongoing working capital deficiencies.

8. The Applicant was asked to eliminate these deficiencies by making capital injections; however, the method the Applicant chose to do so was ineffectual. As a result, the working capital deficiency was never eliminated.

9. Thus, on February 26th, 1986, 632000 had a working capital deficiency of \$134,519 while 632001 had a working capital deficiency of \$147,734.

10. In the fall of 1987, the Registrar insisted that the Applicant eliminate, or at least diminish, the working capital deficiency by injecting capital into the company. The Applicant was unable or unwilling to do so and as a result, each company gave up its registration.

11. On November 17th, 1987, 632000 Ontario Limited and 632001 Ontario Limited each made an Assignment in Bankruptcy. As a result of the bankruptcy, considerable loss was sustained by certain creditors of the corporations. In addition, the Compensation Fund under the Travel Industry Act has incurred liabilities amounting to approximately \$400,000.

12. The Registrar has also alleged that in carrying out his business, the Applicant as sole operator of the various corporations did not act in an honest manner with the Registrar and his staff, as well as with the public. As concerns the public, prior to the summer of 1987, customer deposits were put in a trust account to be applied against travel services. Thereafter, and until the assignments in bankruptcy, the Applicant caused the corporations to progressively liquidate the monies being held in trust and to apply their use, not to the clients' travel arrangements, but to the repayment of a bank loan to the Toronto Dominion Bank for which the Applicant was personally responsible together with his corporations.

13. The Applicant has been sued by National Trust Company, the trustee of the Compensation Fund, for the amount of \$300,000, the amount withdrawn from the various corporate trust accounts to pay the bank. In addition, he has also been sued for \$10,000, being the amount of a cheque which he drew on the corporation and cashed after its bankruptcy. The suit has been contested by the Applicant.

The hearing in this case lasted nine days. We shall summarize the testimony of the various witnesses, as it relates to the issue of the integrity and honesty of the Applicant and, whether he carried on business in accordance with law. If, in fact, the Applicant did not carry on his business as a travel agency in accordance with law and with integrity and honesty, then the Registrar would be justified in believing that he will not do so under the Real Estate and Business Brokers Act.

The Applicant admitted that he was the sole director and shareholder of the various companies mentioned above.

Mr. Hal Burns testified that he has been Registrar under the Travel Industry Act since June 22nd, 1987. He stated that when he reviewed the files of the Applicant, he was concerned by problems in three areas: consumer complaints, financial stability and advertising. He found the Applicant's advertising to be misleading and his record in handling consumer complaints, poor. He tried to work with the Applicant to resolve these problems but received no cooperation.

Mr. Burns said that the Applicant's agencies had a higher incidence of consumer complaints than big agencies. The Applicant was unduly slow in resolving complaints and almost never accepted proposed mediation by the Registrar. In one case, the Applicant even refused to deal with a complaint because the letter of the consumer had been written in French.

In another consumer complaint in which the facts are admitted, some consumers stayed at a Hilton Hotel in the Province of Quebec at the time of a labour dispute. As a result, they did not receive normal hotel service. The hotel transmitted a certain sum of money to the Applicant's agency as compensation for discomfort each consumer had personally suffered. Instead of forwarding this money to the consumers, the Applicant kept the funds.

Mr. Burns then went on to describe certain advertising of the Applicant's companies which he found deceptive. While the advertising was to some extent misleading, the Tribunal did not consider it to constitute a serious breach.

The greatest concern to Mr. Burns was the financial condition of the Applicant. His companies had a constant working capital deficiency as a result of which Mr. Burns feared financial loss for the Compensation Fund, as well as inconvenience to consumers.

Mr. Burns asked the Applicant to remedy this situation in his letter dated October 23rd, 1987, and produced as Exhibit 24, by depositing two irrevocable Letters of Credit in the total amount of \$225,000 payable to National Trust Company Limited, the Trustee of the Compensation Fund. These letters of credit would cover the working capital deficiencies, actual and potential, of the Applicant's companies.

The first Letter of Credit of \$125,000 was to be deposited by November 2nd, 1987, and the second, in the amount of \$100,000, by December 29th, 1987. The Applicant never deposited either Letter of Credit. Instead, on November 13th, 1987, after a meeting of the Applicant and his lawyer with Mr. Burns, the Applicant agreed to cancel his registrations under the Act. The Fund was obliged to step in to provide funds to stranded passengers, beginning November 13th, 1987, because of the Applicant's capital deficiency. It is to be noted that the funds advanced by the Compensation Fund were to replace monies deposited by consumers for travel which had not been used by the Applicant's companies for that purpose.



Mr. Burns stated that since November 13th, 1987, the Compensation Fund has paid \$403,941.31 Cdn. and \$49,988.37 U.S. funds to cover liabilities of the Applicant's companies.

In cross-examination, Mr. Burns stated that the former Registrars had not refused or revoked the corporate registrations of the Applicant because of the capital deficiency. On the other hand, former Registrars did attempt to make the Applicant inject capital to liquidate the deficiency.

Mr. Burns also stated that in the final period prior to the bankruptcy, the corporation had transferred funds in accounts designated as trust accounts into the general account and that those funds were then used to repay bank loans for which the Applicant was personally liable.

Finally, Mr. Burns stated that under the Travel Industry Act, travel agencies were not obliged to deposit advances or prepayments into a segregated trust account, that such sums could be deposited in the general account. He went on to say, however, that inasmuch as the Applicant had set up trust accounts, he had breached an undertaking to maintain them.

The next witness was Mr. John Buckley, presently the Deputy Registrar under the Travel Industry Act and, prior to that, the Assistant-Registrar. He stated that the Applicant's companies had continuous financial problems, viz. a working capital deficiency.

On September 11th, 1986, a letter was sent to the Applicant, Exhibit 31, informing him of a capital deficiency of \$90,781 and asking him to make an injection of capital to cover it.

Certain meetings were held after this letter was sent and on November 5th, 1986, the Registrar sent a further letter, Exhibit 32, in which he confirmed the following arrangements:

1. That the Applicant would make a cash injection of a minimum of \$150,000, not later than November 28th, 1986.
2. That the Applicant would commence operating a trust account effective immediately into which all consumer deposits and payments would be placed.

On November 20th, 1986, Mr. Kleinminitz's accountant sent a letter, Exhibit 33, to the Registrar, with a copy to the Applicant. He stated that Mr. Kleinmintz would inject \$150,000



into the company by November 30th and that this money would be left in the company until such time "as the company has sufficiently recovered through profitability and regenerated sufficient working capital as to recover from the prior years deficits."

Thus, there was a firm undertaking by the Applicant not only to inject \$150,000 into the corporation, but also to leave it there until sufficient working capital was built up.

Pursuant to the undertaking, the Registrar had the inspector return to determine that the \$150,000 in capital had been injected. In his examination of December 31st, 1986, the Registrar could find no record of the \$150,000. It was later discovered that the \$150,00 had been deposited by way of a debenture in favour of the Applicant's wife.

Mr. Buckley found this to be totally inappropriate since it did not constitute a true capital injection, and since the Applicant's wife had prior rights to the \$150,000 over the Compensation Fund.

For this reason, on April 30th, 1987, Mr. Buckley sent a letter, Exhibit 35, to the Applicant stating that the debenture offered no protection for the Fund and asking that a clause be added stating, "That all deposits are subrogated in favour of the Travel Industry Act, Compensation Fund". In the alternative, the Applicant could put up an irrevocable Letter of Credit in the amount of \$150,000.

It is clear from the letter and the testimony of Mr. Buckley that as at April 30th, 1987, he presumed that the \$150,000 debenture was still in effect and that the \$150,000 remained on deposit with the corporation.

Mr. Buckley stated that because the Applicant failed to subrogate the deposit, a meeting was called for June 11th, 1987, to try to resolve the problem. The Applicant came with his accountant and lawyer. At that time, Mr. Buckley was informed for the first time, that the \$150,000 debenture had been repaid and discharged and the sum of \$150,000 removed from the corporate accounts. At that time, the capital deficiency amounted to \$218,000.

The events of the meeting were recapitulated by Mr. Buckley's letter sent July 20th, 1987, Exhibit 26.

In the letter, Mr. Buckley pointed out that the financial position of the Applicant's company had not improved inasmuch as the sums that were meant to be injected had not been, and confirmed

that the Applicant would adopt "a programme of segregated accounts, thereby ensuring the protection of consumer deposits."

He also asked that the Applicant deposit an irrevocable Letter of Credit in the amount of \$220,000 payable to the Trustee of the Compensation Fund.

Mr. Buckley reports that at the meeting, Mr. Kleinmintz had told him that he would be happy to know that Kleinmintz had set up segregated accounts to give more protection to consumers.

In fact, not only did the Applicant fail to inject any additional working capital, but he also went on to present the Registrar's office with a new set of faits accomplis. Thus, on July 27th, 1987, the Applicant sent a letter to Mr. Buckley, Exhibit 27, informing him among other things, that he would do trust accounting, but that he had no obligation to provide segregated accounts. He completely ignored the problem of the \$150,000 debenture or its replacement.

In cross-examination, Mr. Buckley stated that while there are no requirements for trust accounting under the Act for agencies such as the Applicant's, that the Applicant did undertake to do so. In his opinion, the Applicant mislead him both as to the debenture and the method of "trust accounting".

The following witness was Mr. F. Lehner, who is a member of the Board of Trustees of the Compensation Fund. He stated that the Fund had paid approximately \$500,000 Cdn. to cover liabilities of the Applicant's companies. This was confirmed by Ms. Annette Heerschad of the National Trust Company.

The next witness was Ray Steeds, an inspector under the Travel Industry Act. He testified that during inspections from 1982 onward, he found that companies of the Applicant were consistently suffering from a working capital deficiency. He stated that the Applicant did not reply promptly to requests and claimed not to have received certain notices. As a result, all further notices were sent by certified mail.

When asked why the Applicant's companies were allowed to operate when in a working capital deficiency position, he stated that members of the Registrar's office hoped that the Applicant would be able to solve his problems.

Mr. Steeds gave more evidence with respect to the debenture of \$150,000 established in December 1986. It appears that the funds themselves were actually deposited in a different bank from the one in which the companies did business, and that the

debenture had been repaid on March 4th, 1987, without any prior notice or even concurrent notice being given to the Registrar's office. The sum of \$130,000 was paid to the Applicant's wife; see Exhibit 42. Mr. Steeds also stated that despite the Applicant's companies financial condition, they were granted renewed registrations in 1983, 1984, 1985 and 1986.

The following witness was Howard Wasserman, a Trustee in Bankruptcy and chartered accountant, who acted as Trustee to the Applicant's companies.

He also stated that the Applicant had wrongfully taken the sum of \$10,000, which was characterized as a dividend on the corporate cheque. The cheque was deposited after the bankruptcy.

In discussing the \$150,000 debenture transaction, he said that it had not constituted a real injection of working capital and had not, in fact, been used by the company for working capital purposes. He stated that not using the funds and then withdrawing them when the financial condition of the company was precarious constituted abuses.

Mr. Wasserman went on to demonstrate how monies that originally had been in trust accounts were transferred to the general account when the term deposits came due and were then used to repay the loans in favour of the Toronto Dominion Bank which the Applicant had guaranteed.

Mr. Wasserman stated that had the \$150,000 debenture been used as working capital and had customer deposits not been used to repay the Toronto Dominion Bank, the full deposits of customers with Applicant's companies would have been secure.

It is to be noted that the bank loans were repaid to the extent of \$263,000 within seven days of the bankruptcy of the Applicant's company. Previous to that date, the Applicant's companies had never repaid more than \$65,000 at any one time.

By virtue of these payments, the Applicant was freed of his potential personal liability to the Toronto Dominion Bank.

Mr. Wasserman stated that, while he had neither taken nor recommended criminal proceedings against the Applicant, the cashing of the \$10,000 dividend cheque after the bankruptcy constituted an offence under the Bankruptcy Act. The funds represented by the cheque were a company asset which Mr. Kleinmintz was obliged to reveal and return to the Trustee.

In cross-examination, Mr. Wasserman indicated that while the \$10,000 cheque bore the notation "dividend advance", the funds had actually been used to pay Kleinmintz personally the sum of \$2,309 and the balance, to pay employees of the Applicant's companies.

The next witness was Mr. Gordon Randall, Registrar Real Estate and Business Brokers Act. He testified that consumers place great trust in real estate salesman for advice, counsel and common sense.

He refused to grant the registration of Mr. Kleinmintz because of consumer complaints which he found unacceptable while he was a travel agent. He felt that the failure to satisfy judgements or complaints in the past would indicate that the Applicant would continue in this pattern in his new profession. Second, he was concerned by the advertising of the Applicant and feared that he would continue to mislead the public if he were allowed to be registered as a real estate salesman.

Mr. Randall's greatest concern was of the past financial conduct of the Applicant.

Mr. Randall was also concerned by the series of breaches of commitments undertaken by the Applicant to various Registrars under the Travel Industry Act. More particularly, he referred to the \$150,000 debenture and various undertakings to maintain trust accounts.

The Applicant then presented his defence. His first witness was Mr. Steven Burnstein, real estate broker with Royal LePage and Manager of one of their offices. Mr. Burnstein interviewed the applicant and thought he was qualified to be a real estate salesman.

The next witness was Mr. Kleinmintz, the Applicant. He stated that he had operated a travel agency for some twelve and one-half years.

He declared that his companies had had persistent working capital deficiency problems and to get around the problem, he had had to pay current expenditures with client's deposits which were supposed to cover trips.

He stated that in 1975, he had established trust accounts to which client's cheques were deposited and against which cheques could be drawn against specific destinations or problems. He had established the trust accounts because he thought it was required under the Travel Industry Act.



In late Spring of 1987, he found out that there was no requirement under the Act to have segregated trust accounts. That was when he decided to stop using the trust accounts and to liquidate them on a progressive basis.

The Applicant also confirmed the various facts already set out with respect to the \$150,000 cash injection.

Despite the fact that trust accounting was not required under the Act, the Applicant admitted that Mr. Caven, a former Registrar, had told him to begin trust accounting and that he had told Mr. Caven that he was already doing so. It is to be noted that whatever the requirements under the Act, Mr. Caven and the Applicant had apparently agreed that the Applicant would set up trust accounts.

With respect to the \$150,000 debenture, the answers by the Applicant were evasive, self-serving and unsatisfactory. For example, Mr. Kleinmintz alleges that the Registrar was satisfied with the way he injected the \$150,000 in capital when, in fact, all documents and testimony indicate the contrary. See, for example, Exhibit 35.

He also went on to state, that he made no undertaking as to how the \$150,000 would be used or upon its terms for withdrawal. This was a clear breach of the letter written by his accountant which specifically undertook to leave the money in the company until there was no working capital deficiency.

Finally, when he repaid the debenture, he left the Registrar completely in ignorance of such payment. One need only look at the letter of April 30th, 1987 where the Registrar's office continued to ask the Applicant to subordinate the debenture in favour of the Fund. It was, in fact, only on June 11th that the Registrar finally discovered the true situation.

The Tribunal must conclude that Mr. Kleinmintz acted in bad faith at all times in connection with the \$150,000 debenture. He deposited the money in such a way that it could not truly serve to diminish the working capital deficiency of the company; in other words, it did not constitute an injection of capital. He then repaid the money, rather than subordinating it in favour of the Fund and did so without advising the Registrar.

A similar pattern of behaviour also took place with respect to the trust accounts and trust accounting.

When asked about the repayment of the Toronto Dominion Bank loans from funds which had originally been in a trust account,



Mr. Kleinmintz's only explanation was that he wanted to cut interest expenses. This makes no sense given the fact that all the payments had the effect of eliminating the \$300,000 loan within the week of the bankruptcy of his companies.

Mr. Kleinmintz then presented Professor John Evans as an expert witness on the law of trusts. Professor Evans stated that the fact that Mr. Kleinmintz opened up an account called a 'trust account' and put money into it, did not in itself create a trust unless it was established without his being in error. In the case of Mr. Kleinmintz, he said that the trust account was established in error since Mr. Kleinmintz mistakenly believed that he was obliged under the Travel Industry Act to set-up a trust account, when in fact there is no such requirement.

While the Tribunal accepts that Mr. Kleinmintz did not have the obligation to set-up a trust account, and may very well have set it up initially in error, the Tribunal also notes that Kleinmintz continually allayed the fears of various Registrars by referring to the existence of the trust accounts which, he stated, served as protection to consumer deposits. Mr. Kleinmintz should have known that this would induce the Registrar to believe that consumer deposits were safe.

In cross-examination of Mr. Kleinmintz, he admitted that he instructed the Toronto Dominion Bank to credit corporate loans in the week prior to his bankruptcy with funds originating from consumer deposits.

The Tribunal found that Mr. Kleinmintz was often contradictory in his testimony and evasive in his answers. While admitting to cashing a \$10,000 cheque after the bankruptcy and to the facts surrounding the \$150,000 debenture, the justifications he gave were not credible. The same can be said with respect to the trust accounts.

Certainly, as concerns the trust accounts and the \$150,000 debenture, one can conclude that all the acts of Mr. Kleinmintz were calculated to allay the fears of the Registrar while, in fact, not giving effect to his undertakings.

The question before the Tribunal is whether the past behaviour of Mr. Kleinmintz demonstrates that he carried on business in a manner which was not in accordance with law and with integrity and honesty.

Counsel for the Applicant has argued Section 6 of the Real Estate and Business Brokers Act, which is the same wording as Section 4 of the Travel Industry Act should be interpreted to mean

that as long as the Applicant acted in accordance with law, he should be entitled to registration; that is, one must presume that the Applicant has acted with integrity and honesty so long as he has acted in a way which is not against the law.

With great respect, the Tribunal cannot accept this position. One need only consult the wording of Section 6 of the Act to see that it requires three elements: 1) that the applicant act in accordance with law; 2) that he act with integrity; and 3) that he act with honesty. If the sole requirement was that the applicant acted in accordance with law, the Legislature surely would not have added the words "and with integrity and honesty", since they would serve no purpose. Thus, the Tribunal believes that unless the Applicant can also show that he acted with integrity and honesty, the Registrar was entitled to refuse registration on the basis of his past behaviour for which he has shown no remorse.

In Black's Law Dictionary 5th Ed. on page 727, the word "integrity" is defined as follows:

As used in statutes prescribing the qualifications of public officers, trustees, etc., this term means soundness or moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with "probity," "honesty," and "uprightness."

When using the term integrity therefore or honesty, one is not simply looking at whether a person has acted within the narrow framework of the law, but also whether he has acted with openness and in a forthright fashion.

The Registrar, Real Estate and Business Brokers, has found that Mr. Kleinmintz failed to act with honesty and integrity. The decision of the Registrar may be overturned by the Tribunal, but only if it meets the test as set out in the judgement of the Divisional Court of the Supreme Court of Ontario in the case of Brenner and the Registrar of Motor Vehicle Dealers and Salesmen. The Divisional Court held that this Tribunal should only refuse to allow a Registrar to carry out his Proposal if he thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief

that he would not carry on business in accordance with law and with integrity and honesty.

In the absence of such error, the decision of the Registrar must be upheld.

The Tribunal will now review the grounds raised by the Registrar to see whether it was reasonable for the Registrar to reach the decision that the Applicant should not be registered.

The first ground concerned the working capital deficiency of the Applicant and his various actions in resolving the problem. As was stated above, from the early 1980's onward, the Applicant had a continuous working capital deficiency in his business. The Registrar under the Travel Industry Act from the beginning was concerned by the existence of such a deficiency and attempted to work with the Applicant to eliminate it. Finally, the Applicant was asked in writing to make a capital injection of \$150,000.

It is clear from the evidence that the purpose of the capital injection was to invest working capital in the company; that is, money that would be deposited into the corporate account and used for its business.

After meeting, a letter was sent by the accountant of the Applicant undertaking to inject the \$150,000 and to leave it in the company until such time as there was no working capital deficiency. This undertaking would obviously have given great comfort to the Registrar of the Travel Industry. The injection would cover the deficiency and would not be removed while a deficiency of any sort existed. The Applicant should have known the effect of the undertaking.

Unfortunately, instead of fulfilling his clear undertaking, the Applicant chose to inject the \$150,000 by way of a debenture in which his wife had priority. Even more serious, rather than injecting the sums as capital, they were segregated and deposited in a Certificate of Deposit with a different bank branch. In effect, the money was never used for working capital. It served no other purpose than to give the impression that the Applicant had satisfied his undertaking with the Registrar. It is clear from the actions of the Applicant that he had no intention to carry out his undertaking with the Registrar. This is a most serious breach in a regulated industry where it is incumbent upon registrants to deal in good faith and with honesty and integrity with the Registrar.

That the \$150,000 debenture was not injected as capital is serious in itself, but even more so was the breach by the Applicant of his formal undertaking not to repay the debenture until such time as there was no working capital deficiency in the company. In total contravention of this undertaking, the Applicant, in March, 1987, without any prior notice or even subsequent notice, simply repaid to his wife \$130,000 of the \$150,000. Until July some four months later, when the Applicant finally informed the Registrar of the facts, the Registrar was attempting to have the Applicant subrogate the debenture in favour of the trust fund when, in fact, the funds were no longer even on deposit with the company.

The Applicant, instead of fulfilling his obligation, continued in business without injecting capital, and carried on in a fashion which would mislead the Registrar into believing that the problem was being addressed.

The Applicant never took any measures to eliminate the working capital deficiency. He was careful to give the appearance that he was, when in fact all of his acts demonstrate that he had no intention to do so. His failure to carry through on his undertaking, his breach of a written covenant to leave the funds in the company until there was no working capital deficiency, and his failure to disclose that the monies had been withdrawn all constitute acts which are deceptive and by definition, devoid of honesty and integrity. Under the circumstances, the Registrar had reasonable grounds, on the basis of this past conduct, to believe that the Applicant would not carry on business with integrity and honesty if he were granted a licence.

A second ground which the Registrar used as a basis for deciding that the Applicant did not act with honesty and integrity concerned the trust accounts. The Tribunal accepts that under the Travel Industry Act, the Applicant was not legally obliged to maintain segregated trust accounts. This in itself, however, did not relieve the Applicant of the obligation to act with honesty and integrity when dealing with the Registrar of the Travel Industry Act.

It was clearly brought out in evidence that the Applicant on many occasions cited the fact that he had set up the trust accounts so that the Registrar would not have to worry about consumer deposits being in any danger. Thus, while the Applicant was not obliged to set up trust accounts, he chose to do so. Having made this decision and having used it for his benefit, the Applicant was obliged to maintain the trust accounts.



Instead of so doing, when his companies became financially strapped, the Applicant unilaterally decided to close down the trust accounts and put the funds to use to repay bank loans to a company for which he was personally liable. The Applicant may have been within the law doing this, but doing so constituted behaviour which was not honest and which was without integrity.

The Applicant knew that using consumer deposits to pay off a corporate bank loan would result in the Travel Industry fund having to step in to reimburse the consumers. The Applicant also knew that he was using deposits which were designated for travel.

The behaviour of the Applicant with respect both to the debenture and the trust fund, clearly demonstrates that the Applicant did not act with honesty or with integrity.

Again, it was reasonable for the Registrar to conclude that the Applicant's conduct with respect to the trust accounts afforded reasonable grounds for belief that he would not carry on business in accordance with integrity and honesty.

As a third ground for concluding that the Applicant did not act with honesty and integrity, the Registrar cited the \$10,000 dividend advance cheque issued by Applicant's company at his instructions. This cheque was not cashed until a week after the bankruptcy of the company. Whether or not the Applicant was so charged, it is nevertheless clear that he committed an offence under the Bankruptcy Act. The Act stipulates all assets of a company must be returned to the Trustee in Bankruptcy. The Applicant engaged the Trustee and instructed the corporation to make an assignment in bankruptcy. He was advised of his obligations under the Bankruptcy Act. Despite this, he took a certified cheque issued by the company and cashed it for his own personal benefit after the bankruptcy. In so doing, he did not act with honesty and integrity.

The final ground upon which the Registrar refused registration was based on the Applicant's comportment with consumers. The Registrar cited numerous unsatisfied judgements as well as complaints by consumers which were treated in a manner which demonstrated a lack of integrity.

It is clear from the evidence and testimony that the Applicant showed little concern for consumer complaints or claims. He allowed default judgements to be obtained against his companies knowing that the consumer would not be able to realize on these judgements.



In handling complaints, the Applicant acted in a manner which was often highhanded; thus, while he was selling packages to consumers who were French speaking, he refused to even deal with a complaint which was drafted in French. He did this despite the fact that he must have known the nature of the complaint by the tenor of the letter.

The complaint that was most serious to the Applicant concerned the refunds of the Hilton Hotel which were supposed to be distributed to consumers, but which the Applicant chose to keep for himself. The Applicant may not have committed a criminal act in so doing; he did, however, commit a breach of ethics.

He could in no way justify taking funds meant to compensate individual travellers for services not received.

When one observes the actions of the Applicant overall, they cumulatively demonstrate a lack of integrity and honesty. The Registrar therefore was not in error in concluding that the past conduct of Mr. Kleinmintz afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

DANIEL NEIL MCDONALD

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
DR. STEPHEN G. TRIANTIS, Member  
A. DONALD MANCHESTER, Member

APPEARANCES:  
ALVIN TORBIN, representing the Registrar of  
Real Estate and Business Brokers

No one appearing for the Applicant

DATE OF  
HEARING: 2 March 1990 Toronto

REASONS FOR DECISION AND ORDER

No one appearing for the Applicant although properly served with notice of this date reserved for his appeal from the Respondent Registrar of Real Estate and Business Brokers and counsel prepared to proceed. Since the Applicant has not appeared in person or by counsel, we must take it he had abandoned his appeal. The decision of the Registrar to refuse registration shall therefore stand.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JOSEPH MANUEL

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
J. BEVERLEY HOWSON, Member  
MARGARET MEINDL, Member

APPEARANCES;

DAVID B. WILLIAMS, representing the Applicant

D. BOURGEOIS, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 20 March 1990

Toronto

REASONS FOR DECISION AND ORDER

Joseph Manuel was born in Beirut, Lebanon on December 23rd, 1963, and came to Canada with his parents and three brothers on November 22nd, 1977 when he was almost fourteen years old. A sister remained in Lebanon and a brother is in England. Manuel completed high school and served for some five and one-half years in the Canadian militia. He worked in several family businesses over the years and took the real estate course in early 1989 where he obtained a final mark of 87%. He married on September 4th, 1988 and lives with his wife Ghada in their own home in London in which they have an equity of \$50,000. Since 1983, he has been a customer of the Bank of Nova Scotia in London and provided a letter to confirm that "his personal dealings have been handled in a satisfactory manner".

In his application to be registered as a real estate salesman, he noted that he had been registered formerly under the Motor Vehicle Dealers Act with Geo Manuel Industries Ltd. from December 23rd, 1985 to December 23rd, 1987.

He acknowledged an unpaid judgment and certain convictions by attaching a note to the application on which was typewritten:

TO WHOM IT MAY CONCERN

RE JOSEPH MANUEL

UNPAID JUDGEMENT SINCE 1986 FOR 2103.35 FOR

SELLING MY CAR AND THE AIR CONDITION DID NOT WORK AND I SPOILED THE MAN TRIP TO FLORIDA. I WAS NOT NOTIFIED OF THE COURT DATE SO THE MAN I SOLD THE CAR TO WON THE CASE.

RE JOSEPH MANUEL (GEO MANUEL IND LTD)

COMPANY I WORK FOR IS BEING CHARGED WITH FRAUD AND 1 OF THE CHARGES IS AGAINST (SIC) ME. WE APPEAR IN COURT OCTOBER 30 31 1989

RE JOSEPH MANUEL

JULY OF 1985 I WAS CHARGED WITH WOUNDING FOR SHOOTING A MAN IN BOTH LEGS FOR BEATING MY YOUNGER BROTHER. I WAS FOUND GUILTY.

His sponsoring broker is Joseph Pinheiro of Pinheiro Realty and Insurance Ltd. of London to whom Manuel explained the details of his list. Registration under the Real Estate and Business Brokers Act was granted to Manuel on July 18th, 1989.

Gordon Randall is the Registrar of Real Estate and Business Brokers and confirmed the registration of Manuel, but added that this was done in error as a summer student filling the position of registration clerk and handling the file did not refer the attached list to a superior. If the file had been referred, the Judgement, the fraud charge and the assault convictions together with the failure to report another assault conviction would have led to a rejection of the application.

In addition, the conviction record and driving record would have been obtained, a current Sheriff's certificate would have been ordered and the Registrar of Motor Vehicle Dealers would have been contacted for any comments. If the outstanding Judgement had been the only matter, arrangements to pay it off could have been made and the one execution would not have been a bar to Manuel's registration, in the opinion of the Registrar.

In reviewing the past conduct of an applicant, the Registrar is particularly interested in matters of violence, fraud and money issues and in this case, on a review, moved to quickly revoke Manuel's registration by a Proposal on August 25th, 1989.

The particulars upon which the Registrar based his decision are as follows:

1. The Registrant was convicted on April 9, 1984 of assault.
2. The Registrant was convicted on October 15, 1986 of assault with intent to cause bodily harm.

The Registrant was convicted on October 15, 1986 with possession of a weapon.

The Registrant was convicted on October 15, 1986 with possession of a restricted weapon other than at an authorized place.

3. The Registrant has been charged with fraud and is scheduled to appear on October 30, and 31, 1989.
4. The Registrant has an outstanding Judgement in the amount of \$2,103.35 for selling an automobile that was defective.
5. The Registrant responded "Yes" to the question in the application "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending?"

The Registrant disclosed some of the particulars of the convictions of October 15, 1986 but failed to disclose any information about the conviction of April 9, 1984.

The evidence provided by the Registrar with respect to these matters was as follows:

1. On April 9th, 1984, Manuel was convicted in London, Ontario of assault and was fined \$200.00.
2. On October 15th, 1986, Manuel was convicted in London, Ontario of assault with intent to cause bodily harm, with possession of a weapon and with possession of a restricted weapon other than at an authorized place. The penalties assessed were



respectively a 90-day intermittent sentence to be served on week-ends with one year probation on terms, a one month intermittent sentence concurrent and a fine of \$350.00

3. On October 30th, 1989, Manuel was convicted in London, Ontario of defrauding Mark Bradnam of more than \$1,000 contrary to Section 338 of the Criminal Code; and was fined \$400.
4. On September 17th, 1985, Joseph Vetere and Patricia Joan Smith obtained a District Court default Judgement against Manuel in the amount of \$1,503.35, together with total costs fixed at \$650.00 for a total obligation of \$2,153.35, together with certain filing fees.
5. While Manuel answered "Yes" to the question on the application referring to any conviction under any law, he did not disclose on his attached list the events set out in Item 1 above nor did he disclose any convictions under the Highway Traffic Act.

The responses by Manuel to the various matters is as follows:

1. Manuel admitted forgetting to put on the application the event which occurred when he was nineteen. He stated that he had gone to the assistance of his brother who was being threatened by a big man in their store. Having strong family loyalties from their Beirut experience led Manuel to react as he did.
2. The three convictions in 1986 were fully canvassed and explained in the decision of Judge Gordon Killeen which was given on October 15th,

1986 and which is in our exhibits. The Judge referred to a series of bizarre events and concluded:

My impression of Wilson and his cohorts was, and still is, that they were a thoroughly bad lot, a thoroughly unsavoury bunch of characters who, in their own good time, will probably get into trouble with the law, and who had already got into trouble with the law on several occasions before this night and I contrast their backgrounds and their bad characters with the previously good characters that you two young men have enjoyed since you came to Canada with your families.

You come from fine stock, from immigrants from another country who have made their way well in this country, and the evidence I have in the form of Pre-Sentence Reports and otherwise, indicates that both of you have worked diligently as students and as young adults to further your own best interests as Canadian citizens, and to advance the interests of your community. In other words, both of you have enjoyed good characters, solid good characters throughout your lives in Canada, and you come from good families who have instilled those qualities in you.

What happened on this night was completely out of character, and was occasioned as a result of a highly emotional and charged situation which was started, I have no doubt, by the Wilsons and their gang, and that's really the only fair characterization for them. But, as I said, you were fairly convicted by the jury on the evidence; they decided that each of you had been proven guilty beyond a reasonable

doubt on the charges on which they convicted you, and there was evidence supporting their verdicts.

You, Joseph, foolishly discharged the firearm in the direction of Wilson and hit him in the legs. Fortunately, there was no serious injury, and he completely recovered, but it could have been more serious. But, I take into account what was happening out on that parking lot at the Junction, and that was chaos, that's the evidence. There were several fights out there between the two groups, the Wilson group and your group; man on man and group on group, and I think you lost control of yourself in the agony of the moment and did something terribly stupid and criminal, but what happened is explicable in terms of the total background. It doesn't justify it, but it explains it in your favour.

3. This count was the only one of a group of twenty-one concerning various motor vehicle matters in which Manuel was involved. They involved activities at Golden Gate Motors, a family business in London. As part of an agreed settlement, Manuel pleaded guilty while his brothers Makarios and Konstantin pleaded guilty to six and five other counts respectively. The event occurred when Manuel was working at the garage before his registration as a motor vehicle salesman. He stated that there was an unintentional misrepresentation when a car with 163,000 kms on the odometer was sold as having only 63,000 kms thereon. He stated that he did not know of any wrongdoing by anyone, but was charged as he had been the person who dealt with the customer that had checked the

mileage with a previous owner. The guilty plea was made to avoid the full expenses of a trial for all when \$20,000 had already been spent on legal advice to date and the family could not afford any further payments.

4. Manuel stated that in the early winter months of 1985, a car was sold as certified by a dealer and problems with the air conditioner then arose when the buyers drove this car to Florida. A default Judgement was obtained against Manuel who successfully moved to set it aside in order to file a Statement of Defence. However, since that order was granted on condition that the monies with costs be paid into Court and Manuel did not have the funds to do so, the Judgement still stands against him.
5. While Manuel did not have to put any reference to the pending fraud charges on his list, the fact that he did so showed his openness and reinforces his honest error in forgetting to refer to this assault event. Manuel also admitted certain minor driving violations and acknowledged that he had not referred to them on his list. No driving record was produced for the Tribunal. Manuel stated that there had been no further driving offenses at least since his marriage in 1988.

In argument, counsel for the Registrar referred the Tribunal to recent decisions on the matter of the failure to fully disclose past events: (Berton C. Kelly (1984) 13 CRAT 147; Gilford Garage (1982) 11 CRAT 52; Allan Mark Gilroy (1989) 18 CRAT 285). He also referred to the Tribunal, the Registrar's attitude as to public protection: (Ronald Northover (1984) 13 CRAT 292; Giovanni Gianinini (1985) 14 CRAT 179; Gary Brian Williamson (1987) 16 CRAT 266); the type of offenses (Paul R. Burke (1985) 14 CRAT 82;

Joseph Anthony Walker (1988) 17 CRAT 90) and the passage of time that should occur (Brian Crawford (1983) 12 CRAT 64).

Joseph Manuel is a neat, well-spoken young man now twenty-five years old. He is married, has a home with a substantial equity and has matured over the past several years. He has been a registered real estate salesman for some nine months, has completed some transactions, has letters of reference and there have been no complaints made to the Registrar about his activities as a salesman.

Having considered the cases referred to the Tribunal by both parties, and considered the prospects and history of the Applicant, this Tribunal has concluded that each of the grounds upon which the Registrar has based his Proposal has been substantially and fairly answered by Manuel. We conclude that in this situation, there are not even by an accumulation, reasonable grounds upon which registration should be revoked and by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, we direct the Registrar not to carry out his Proposal, but to continue Manuel's registration for the balance of the usual two year term on the following terms and conditions:

1. That Manuel obtain a discharge of the Writ of Execution registered against him by Joseph Vetere and Patricia Joanne Smith and provide the Registrar with a clear Sheriff's Certificate by June 1st, 1990.
2. That Joseph Pinheiro shall undertake to report in writing to the Registrar on the conduct of Mr. Manuel on June 1st, 1990 and every three months thereafter for such period as the Registrar deems appropriate.
3. That any application for transfer to another broker by Mr. Manuel shall be subject to the approval of the Registrar which approval may contain the requirement of undertaking in paragraph 2 hereof and will not be unreasonable withheld.



VICTOR MOTA

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
DR. STEPHEN G. TRIANTIS, Member  
A. DONALD MANCHESTER, Member

APPEARANCES:

DON BOURGEOIS, representing the  
Registrar of Real Estate and Business Brokers

No one appearing for the Applicant

DATE OF  
HEARING:

29 March 1990

Toronto

REASONS FOR DECISION AND ORDER

This is an application by way of appeal of the Registrar's decision to refuse registration to the Applicant Victor Mota. It is the view of the Tribunal upon hearing the evidence that has been presented that the substantial non-disclosure in the Applicant's registration is, in fact, an indication of a lack of integrity. That, together with the evidence of the unresolved judgments, the evidence of the revocation of licence in another registered industry, clearly demonstrates to the Tribunal that the Registrar has acted properly and with appropriate consideration under his requirements under the Real Estate and Business Brokers Act and his responsibility to the general public. Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

MORRIS (MOE) ROSEN and  
MDH REALTY CORPORATION

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION and  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;

MORRIS (MOE) ROSEN, appearing on his own behalf  
and as agent

CHRISTINA CHRISTOPHE, representing the Registrar  
under the Real Estate and Business Brokers Act

DATE OF

HEARING: 4, 5, 6, 10, 11 December 1990

Toronto

REASONS FOR DECISION AND ORDER

This is a matter coming before the Commercial Registration Appeal Tribunal to revoke the existing registration of Morris (Moe) Rosen as a sole proprietor broker and to refuse the registration of MDH Realty Corporation as a broker and the application of Morris (Moe) Rosen as an employee/broker of MDH Realty Corporation.

The matter is of considerable concern in as much as Morris Rosen has been registered as a real estate salesperson since October 16, 1984 with the following companies:

Mister Real Estate Inc.	October 1984 to May 1985
Royal Le Page Real Estate Services Limited	May 1985 to February 1986
David Brand Real Estate (1983) Ltd.	March 1986 to June 1986
City Commercial Realty Corp.	June 1986 to January 1987
Ed Lowe Limited	January 1987 to April 1987

Bay Corp. Realty Inc.

April 1987 to December 1987

Furthermore, Morris Rosen has been registered as a sole proprietor broker from August 30, 1988 to the present time.

Thus revocation of his registration is a matter not to be considered lightly. The basis of the Registrar's Proposal to revoke Rosen's registration and to refuse the registration of his company and himself is based on several factors. One is the question of whether in his applications for registration, Rosen has answered truthfully with respect to previous registrations under the Real Estate and Business Brokers Act or any other Act.

While Rosen's answers as they applied to him were technically correct, the Registrar in his Notice of Proposal took the position that Rosen as the sole shareholder and director and, in fact, directing mind of certain Companies: Tri-M Construction Limited, Marmion Building Corporation and Renmor Building Corporation had been registered under the Ontario New Home Warranty Program and that his registration under such Program and under the governing Act had been revoked by the decision of this Tribunal on November 19, 1984.

In fact, in the course of the evidence before this current Tribunal, it came to light that the revocation of the registration under the Ontario New Home Warranty Program was that of Tri-M and Marmion, Rosen himself not having been specifically registered under the Act.

The Registrar, however, relied substantially on the decision of the Tribunal which found that Rosen as the directing mind could not hide himself under the veil of his corporate entities and, in fact, in the decision of the Tribunal in November 1984, a direction was given as follows:

The Tribunal further advises that this revocation [that of Tri-M and Marmion] shall be permanent and as well that neither Mr. Rosen or any company wholly or partially under

the control of Mr. Rosen receive registration under this Act.

In addition, the Registrar was of the view that Rosen had not behaved in a proper and forthright manner with his previous employers and had filed in bankruptcy owing them a

substantial amount of money and not recognising some of his creditors as creditors in the bankruptcy proceedings.

In the course of the evidence given before the Tribunal, it became apparent that a number of factors based upon inexperience had occurred in the granting of registration to Mr. Rosen as a sole proprietor broker in August 1988.

In the first instance, his application for registration as a broker was received in the office of the Registrar on December 14, 1987 at a time when Rosen was an undischarged bankrupt. It appears that Rosen's academic qualifications would expire on December 19, 1987, but the registration was received notwithstanding. Subsequently, he was discharged on February 29, 1988 and his trustee in bankruptcy was discharged on August 31, 1988 at which time Rosen was registered as a broker.

The second error resulting from inexperience was that in the application as filed with the Registrar's office, indication was given by Rosen that there was a contingency claim in favour of the Ontario New Home Warranty Program. Inquiries were made of the Program and the Program informed the Registrar's office that expenditures in excess of \$230,000 had been made under the Program's warranties in respect of companies of which Mr. Rosen had been an officer and director. Notwithstanding this revelation, the registration of Mr. Rosen as a sole proprietor broker issued on August 30, 1988.

Subsequently on February 8, 1989, Mr. Rosen applied as an employee broker of MDH Realty Corp, and MDH Realty Corp. also applied for registration as a broker on February 8, 1989. As a result of enquiries made by Mr. Rosen of the processing of these applications, the matter came to the attention of the current Registrar, and as well a copy of the decision of the Commercial Registration Appeal Tribunal under the New Home Warranties Plan Act of November 1984 was brought to the attention of the Registrar. The nature of the decision and the amount of the loss sustained by the Program caused sufficient concern to the Registrar that he met Rosen and not being satisfied with the responses issued his Proposal of November 3, 1989, with which the Tribunal is now dealing.

Because the hearing before the Commercial Registration Appeal Tribunal is a hearing *de novo*, the Tribunal was able to observe Mr. Rosen's conduct of his application which he handled himself. In particular, the Tribunal has been able to assess his treatment of the witnesses, the evidence given by those witnesses and the evidence given specifically by Mr. Rosen himself.

Three witnesses, who had dealt with Mr. Rosen in his capacity as a corporate builder in 1983, were called to give evidence. The stress which they had been subjected to seven years ago was still very evident as they gave their evidence. In particular, they were upset that they had received letters personally written by Mr. Rosen and which were referred to in the decision of the Tribunal of November 1984, which letters were not only inaccurate but untruthful.

Mr. Rosen vigorously cross-examined each of the three witnesses intimating to each of them that he had done them a favour by failing to complete their purchase contracts since they had subsequently bought houses which have, in the economic climate, increased in value.

He also pointed out to them that they had received the return of their deposits, although these were not returned by Mr. Rosen or any of his companies, but rather by the Ontario New Home Warranty Program. These three witnesses were totally innocent of any wrongdoing although Mr. Rosen attempted to indicate that they had cancelled their contracts. Such cancellation had taken place, however, at a time many months after the initial contracts and during a period when not a shovel had been put into the ground and there was no indication that there would subsequently be any construction undertaken. Not only was Mr. Rosen severe in his cross-examination of these witnesses, but neither then nor in evidence given by himself, did he show any remorse nor did he indicate any apology was in order from him to these individuals.

Several of his previous broker employers were also called to give evidence. Three of them indicated that Mr. Rosen had left their employ owing them money. While in one case the amounts were not substantial and in the case of one of the brokers, there was some question as to the propriety of the conduct of his business, nevertheless, there was again exhibited by Mr. Rosen in his cross-examination of these witnesses, a total disregard for any obligation to any of his former employers.

It should be noted that even the one broker called by Mr. Rosen who testified favourably as to Mr. Rosen's attitude, stated that it was not entirely favourable that a salesman would be employed with six different brokers in the space of three years.

One of the witnesses also indicated that Mr. Rosen's activities as a salesman for his company had been unsatisfactory because he was working for Burger King at the same time as he was working for City Commercial Realty Corp. This would appear to be in violation of Section 30 of the Real Estate and Business Brokers Act.



One of the other brokers indicated that he had had a complaint after Mr. Rosen left his employ at Mister Real Estate Inc. with reference to Mr. Rosen's continuing to hold himself out as being an employee of Mister Real Estate Inc.

In his own evidence, Mr. Rosen indicated that he was involved in leasing commercial properties currently for a commercial developer. While there is no prohibition in his so doing, he further indicated that he was doing it through his Corporation MDH Realty Corporation which is not a registered broker under the Act. Mr. Rosen's attitude was that there was nothing wrong with this, that he did not even have to be registered and, therefore, MDH Realty Corporation did not have to be registered.

While there is provision under Section 5(f) for non-registration of a full-time salaried employee, there is no such provision for a corporation. Mr. Rosen stated that, in his view, he was simply acting through his corporation in a consulting capacity. While the view of this Tribunal is that there may be some question in that regard as to whether such activity falls within the definition of a trade in real estate as defined in Section 1(n) of the Real Estate and Business Brokers Act, the Tribunal is very much concerned at the attitude expressed by Mr. Rosen in this and in his dealings with his former employers and with those persons with whom he had previously contracted while involved in the building industry.

Mr. Rosen exhibited to the Tribunal an attitude which seems closely to approach the skirting of the law which would entitle the Registrar to assume that his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. If Mr. Rosen were to be in the employ of a broker other than himself, perhaps some reasonable control could be exerted over him in this regard which might satisfy the Registrar. The application of Mr. Rosen, however, which is under review is that he, as a sole proprietor of a corporation controlled by him, would be a broker employee of his broker corporation. Controls, therefore, would almost be impossible to impose and under those circumstances, the Tribunal is of the view that the Registrar is correct in his Proposal, notwithstanding, the drastic result which follows from enacting such Proposal.

Therefore, by virtue of the authority vested under Section 9(4) of the Real Estate and Business Broker Act the Tribunal directs the Registrar to carry out his Proposal.

M. SILLS

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
HELEN J. MORNINGSTAR, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;  
MICHAEL SILLS, appearing on his own behalf  
C. CHRISTOPHE, representing the Registrar under the  
Real Estate and Business Brokers Act

DATES OF  
HEARING: 10 May, 20 June 1990 Toronto

REASONS FOR DECISION AND ORDER

Michael Sills applied for registration as a real estate salesman in an application dated the 21st day of August, 1989. The Registrar's response was a refusal of the Applicant as a registrant on the grounds that

- (a) his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

That is the only ground advanced by the Registrar for his refusal.

In the application, Sills provided particulars of his occupations. He had been a police constable with the Metropolitan Toronto Police Force since June 14, 1974 and was still so employed.

The application contains a question regarding previous convictions which Sills answered in the affirmative attaching to the application, a typewritten letter explaining a conviction for perjury in Toronto on June 18, 1986. In admitting the conviction under the Criminal Code, Sills also admitted he was fined the sum of \$2,000 and given probation for one year. Dissatisfied with his conviction Sills had appealed, but it was upheld by the higher

Court in June of 1987. The sentence, however, was left undisturbed.

Despite the conviction the Applicant continued in his employment with the Metropolitan Toronto Police Force, but was charged with discreditable conduct under the Police Act, and after a finding of guilty reduced to third class constable from his rank as a first class constable for a period of six months and to second class constable for a further six months. The date of this conviction was January 13, 1989 and Sills now having served his time has regained his rank as a first class constable.

The Registrar, Gordon Randall in his evidence observed that he was very concerned about the conviction for perjury while Sills was serving as a police officer. He says it raises the issue of integrity since the Applicant having taken an oath to uphold the law then broke it. Students, he says, are told to inquire during their real estate course whether or not a conviction would be a bar to entering the field and that inquiry would be given consideration at his office. He further pointed out that in refusing registration, he was not depriving the appellant of a livelihood since he was well employed with the police force.

The Applicant Michael Sills in giving evidence preferred not to take the oath. We might point out, however, that we attach no significance to the fact that his evidence was not sworn primarily because of the manner in which it was given. If a man is honest, the Bible will have little effect on his evidence. If on the other hand, he is dishonest, it will probably have less.

Sills, aged 35 is married with one child. He resides at 221 Cassandra Blvd., #1016, Don Mills and has been a constable with the Metropolitan Police Force since 1974. He said "I was forthright in my application" and that appears to be true since the conviction - the only bar to registration - was admitted. His marks are more than satisfactory since he attained 91½ in segment three of the real estate course. In his capacity as a first class constable, he is a coordinator and analyst for the hold-up squad, but desires to enter the real estate field when he retires after 25 years on the force. In the meantime, he wishes to gain experience with a broker on a part-time basis.

In admitting his convictions, both for perjury under the Criminal Code and discreditable conduct under the Police Act, he advances the mitigating factor that he committed no offence for gain, but for entirely unselfish motives. He had, in fact, been instrumental in setting an innocent man free who might otherwise have been in jail for some considerable time. That there were

extenuating circumstances is reflected in the decision of the Judge who levied a fine instead of a jail sentence.

Steven Ferrari, an associate broker with Homelife Rouge Valley Real Estate in Ajax gave evidence on behalf of the appellant. He had a background with the police force having been with the Metropolitan Toronto Police Force for ten and one-half years as a first class constable and has been in the real estate field for the past six years. He has known Sills for ten years and is aware of the convictions. Nevertheless, Ferrari is prepared to recommend him as a salesman to his associate broker and does not question his honesty or integrity.

George McNab, also a police constable, in his evidence on behalf of Sills, said he spends most of his time in real estate although a police constable for seventeen years. He is a broker and his wife an owner/broker. Fully aware of the charges against Sills, he points out that since the police force continue to employ Sills despite the convictions, it demonstrates the high opinion in which he is held by the force. If Sills is licensed as a salesman he says, he could supervise all his transactions and he has the ultimate responsibility for conduct in his office.

In her submissions on behalf of the Registrar, Ms. Christophe points out that the conviction of perjury is a most serious offence. The elements which the Crown is required to prove are first, that the evidence was false, second, that the accused knew it was false and third, that the accused gave it with the intention of misleading the court. Although a plea of not guilty was entered, the Court convicted and the conviction was upheld on appeal.

Although the police force has kept Sills on the force, he has been relegated to the duties which do not require his attendance in court and, therefore, he is not required to take the oath.

Arising out of the same offence, of course, is the conviction for discreditable conduct under the Police Act. None of this is denied and the only issue before us is what weight should it carry, what bearing has it on whether or not this man should be registered as a real estate salesman.

Ms. Christophe has referred us to a number of authorities, in particular the Gary Williamson case 1987 CRAT 266, the principles of which she contends apply particularly to Sills. In that case, the evidence was that Williamson had joined the Argosy Financial Group of Canada in September 1974 and resigned from the company in December 1979.



In 1976 Argosy moved into the field of syndicated mortgages and was eventually found to have defrauded over one thousand investors of a total of over \$24,000,000.

.....

In 1985 Williamson pleaded guilty to nine counts of fraud contrary to the Criminal Code. These convictions arose out of Mr. Williamson's employment with the Argosy Financial Group of Canada.\*

Williamson served his prison sentence and after passing the real estate course, applied for registration as a salesman. This registration was denied by the Registrar and upheld by the Commercial Registration Appeal Tribunal.

One of the grounds advanced by the Tribunal was the question of rehabilitation considered at page 271:

In the present case, while there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding that the Registrar has erred in refusing to grant the registration.

\* 1987 CRAT 266,267

The Crown Attorney in his submissions on Williamson's sentence said:

He has entered a plea of guilty to nine counts of fraud. I would indicate to your Lordship that they represent eight separate projects in Ontario and the sale of debentures. As I have indicated before, it is an amount totalling approximately \$13,000,000

.....



I would indicate however that Mr. Williamson did divert some of the investor's money to his own use. Now in fairness to Mr. Williamson I would indicate the amount was insignificant when compared to that diverted by the major Argosy principal. Nevertheless Mr. Williamson did receive a sum of money and his hidden interest in various of these projects has had the potential of gaining for him even greater amounts.\*

We distinguish this case from the one at bar on the following grounds - the offence, the continuing nature of the offence, the motive (obviously for personal gain), the damage to the public, perhaps in some cases irreparable, and rehabilitation of the accused. None of these considerations apply to Sills except that he committed an offence. His transgression was clearly not selfish and not for personal gain. He injured no one financially or otherwise, but on the other hand succeeded in setting an innocent man free. His unblemished record has, except for the offence, remained so. Rehabilitation is, in our view, not necessarily an issue when we consider a single offence and particularly when the consequences are so severe, they take a toll unlikely to be forgotten.

\*1987 CRAT 268,269

In sentencing Sills for perjury, the Court stated:

I think I should comment at this time that in my view neither rehabilitation nor specific deterrence are concerns, for I am sure that having gone through this ordeal Mr. Sills will not find himself again in the same situation.

and continuing, the Court said:

It is also abundantly clear that Sills stood to gain nothing by lying.

This Tribunal has had the benefit of the complete background and record of Constable Sills as a police officer. It is as we have previous noted exemplary. We have heard from two officers now in real estate who would not only recommend, but employ him without reservation. Finally and perhaps most relevant,

we have had the opportunity Mr. Sill's presentation as a witness. This opportunity had not been afforded to the Registrar when he made his Proposal and we find on all the evidence that he has erred in his refusal to register the appellant.

Nevertheless, the following terms and conditions have been set by the Tribunal. Mr. Sills on registration shall undertake to observe them.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to grant registration to Michael Sills subject to the following terms and conditions:

1. For the period of registrations, Sill's registration shall be with Homelife/Quality Realty Inc., George McNab broker, under the supervision and monitoring of Mr. George McNab, and such registration shall continue during the period unless changed with the consent of the broker and acceptance of the Registrar; any substituted broker during this period shall agree with the Registrar as to the obligations imposed herein.
2. The broker, George McNab, Homelife/Quality Realty Inc., shall supervise all real estate activities of Sills, including approving his advertising, sales agreements and contacting all purchasers and vendors for whom Sills arranges a completed agreement.
3. The broker shall report quarterly to the Registrar on the comportment and behaviour of Mr. Sills stating that Mr. Sills is fully satisfying the Real Estate and Business Brokers Act. These quarterly reports will begin three months after registration and every three months thereafter.

JEYARAJAH SINNADURAI

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS  
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
GORDON R. DRYDEN, Member  
GEORGE J. CORMACK, Member

APPEARANCES;  
ALAN J. DAVIS, representing the Applicant  
GAIL MIDANIK, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF  
HEARING: 23 May 1990 Toronto

REASONS FOR DECISION AND ORDER

By application dated the 1st day of May, 1989, Jeyarajah Sinnadurai applied to the Registrar of Real Estate and Business Brokers for a licence as a real estate salesman.

Mr. Sinnadurai was at that time and still remains an employee of the department of the Ministry of Community and Social Services which, by letter dated September 25, 1989, indicated no objection by that department to his application.

To the standard question on the application, Question 6, "Have you ever been convicted or found guilty of an offence under any law or are any charges now pending?", the Applicant replied "No". He did, however, attach to the application a letter (Exhibit 5a) from a lawyer, Kenneth M. Anders of Toronto who had apparently represented him on a charge of theft under \$1,000 in the Provincial Court on February 6, 1989. The letter refers to Mr. Sinnadurai's plea of guilty to the charge and its disposition by the Court. Since there appear to be some extenuating circumstances leading the Court to grant a conditional discharge, the letter is reproduced in toto:

April 28, 1989

TO WHOM IT MAY CONCERN

I acted as counsel for Mr. Sinnadurai with respect to a charge

of theft under Feb. 6, 1989. He pleaded guilty on that date and received a conditional discharge.

The facts, very briefly involved Mr. Sinnadurai taking a passport from a friend. This passport was used a few weeks later by his brother in order to escape with him life from Sri Lanka.

Prior to this Mr. Sinnadurai had never had any involvement with the law and he presently has no charges pending & further it would be a safe bet that he would never find himself in trouble again. Actually as the judge found, it was more an act of compassion than of crime.

Unhesitatingly I would recommend Mr. Sinnadurai as a man of principles who I believe possesses those good qualities one would expect in a professional Real Estate Agent.

Yours truly

"Kenneth M. Anders"

On receipt of the application, Grace Kwok, an employee of the Registrar's office wrote to Mr. Sinnadurai requesting, inter alia, a copy of the Court Order indicating the disposition of the charge. She also called a Mr. Ellis, the broker sponsoring the appellant, and asked him if Mr. Sinnadurai had disclosed the offence to him. Mr. Ellis replied that he had not. In answer, however, to a question of whether or not Mr. Ellis would still sponsor and employ him, Ms. Kwok observed that he said he would.

Ms. Kwok further requested the Applicant to provide a letter of confirmation of his response to Question 6 and on October 4, 1989, Mr. Sinnadurai replied stating that his response to Question 6 was not correct and, "It was only through inadvertence and not done intentionally that I checked off the 'No'."

Subsequently, Ms. Kwok had a meeting with the Applicant and a Ms. Mary Mollo, representing the broker, Mr. Jack Ellis, since the Registrar had refused the licence. The discussion apparently bore little fruit since the Registrar on January 12, 1990, issued his Proposal in which he says:

In the Registrar's opinion, Sinnadurai is not entitled to registration under Section 6 of the Act as:

a) his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Mr. Randall, in his evidence, pointed out that he was troubled initially about the discrepancy between the answer to Question 6 and the letter from Mr. Anders attached to the application. He was further concerned about the reply from Mr. Sinnadurai in which he said it was only through inadvertence that he answered the question in the negative.

He also observed that the broker knew nothing about the offence until notified by the department and that it certainly should have been disclosed to the employer who was supporting his application. The Registrar further takes the very firm position that all matters relevant to the offence should have been disclosed to his department with the application instead of having to demand them and obtain them in a piecemeal manner.

He also noted that when the application was received in May, Mr. Sinnadurai was on probation which would not expire until the following October.

It was not simply one matter which concerned the Registrar, but three or four issues which cumulatively motivated him to issue the Proposal. One of these was the seriousness of the offence. The theft of a passport, he considered as most serious because of the trust imposed upon one in its use. He could find no excuse for the fraudulent use of the document. A further matter of concern was the recency of the offence and the plea of guilty which was entered only three months before the application was made for a licence. He pointed out that a person once licensed is presumed by the public to have passed the test to practise in the field and one of these tests was that of integrity.

Ms. Mary Mollo, Manager of the sponsoring broker, said in her evidence that she was still willing to have the Applicant



join her firm. She pointed out that Mr. Sinnadurai had told her the reason he answered "No" to the question concerning convictions, was because his lawyer advised him to do so. In his letter to the department, however, Mr. Sinnadurai said it was only by inadvertence and in his own later testimony before the Tribunal, he indicated he had not discussed it with his lawyer, but simply received the letter he asked for concerning the offence which he submitted with his application.

Mr. Sinnadurai is not an unintelligent man and is quite fluent in the English language. He is 36 years of age and came to Canada from Sri Lanka in 1983. Since then he has had various jobs and is now well employed with the Ministry of Community and Social Services as a computer services officer. In that connection, he holds a Master's degree in computer science from an English university. It appears that he stole the passport to gain his brother's escape from Sri Lanka, but no more evidence was adduced on that point.

His counsel, Mr. Davis has argued that since the Applicant received a conditional discharge, he was not in fact convicted and, therefore, not bound to disclose the offence by answering Question 6 in the affirmative. He referred to the argument set forth by Clayton Ruby in his book at page 208 which states: "A person who has been granted a discharge may truthfully state that he has never been convicted of a criminal offence and he has no criminal record, although a record is undoubtedly kept of the finding of guilt and the discharge."

We assume that to be a correct statement of the present law and take no issue with it. It naturally follows that one in the position of the Applicant may feel entitled to answer any question concerning a conviction in the negative. The difficulty this Applicant finds himself in, however, is that the question is twofold and the second part refers to a finding of guilt.

The Certificate of Information (Exhibit 10) from the Metropolitan Toronto Police Department indicates a plea and a finding by the Court of 'guilty'. The question was, therefore, not answered truthfully. In fairness to the Applicant, however, it must be conceded that the letter from Mr. Anders attached to the application does refer to the plea of guilty to the offence.

Mr. Davis has further referred us to a number of authorities decided by this Tribunal wherein it has been held that a conviction for a Criminal offence has not been a bar to registration. We agree with that principle, but must point out that each case stands on its own merits.

In this appeal, we are faced with the Registrar's view that the Applicant should not be registered and at the date of this hearing, Mr. Randall, the Registrar continued to express that opinion. The question we must ask is simply, "Is there anything in the evidence adduced by the Applicant that the Registrar was unaware of when he issued his Proposal?"

It appears there is no new evidence for us to consider, except letters as produced by Mr. Davis on behalf of the Applicant and which go to character evidence. These are, of course, all favourable to him and naturally reflect the opinions of those persons to whom he is known. But they do not have any bearing on the facts.

The theft of a passport and its fraudulent use is, in our view, an offence perhaps more serious than the simple theft of money because of its implications and the possible result of other offences flowing from it. Mr Sinnadurai's statement that he inadvertently answered Question 6 incorrectly, while he told Ms. Mollo that his lawyer told him to answer it in the negative, and in his own evidence admitted that he had not discussed it with his lawyer are inconsistencies which we cannot reconcile. There is a thread of doubt and a lack of truth running throughout this matter, which inclines us to the Registrar's opinion and precludes our finding him to be wrong. (Re: Brenner).

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

JAMES STUBBS

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
A. DONALD MANCHESTER, Member

APPEARANCES;

JAMES STUBBS, appearing on his own behalf

GAIL MIDANIK, representing the Registrar under the  
Real Estate and Business Brokers Act

DATE OF

HEARING: 3 May 1990

Toronto

REASONS FOR DECISION AND ORDER

The Notice of Proposal to refuse registration by the Registrar cites two reasons: the one being the past conduct of the Applicant and the second being his financial position.

The decision of the Registrar was based upon the fact that the Applicant James Stubbs was convicted of kidnapping on March 18, 1982, and sentenced to four years in prison. In addition, he was convicted of using a firearm during the commission of the kidnapping offence and given a further consecutive year.

Stubbs fully disclosed these facts in his application and in the evidence of the Registrar, Stubbs was forthright in dealing with the matter. The Registrar indicated that while he had a great deal of sympathy for Stubbs in a personal manner, nevertheless, in his capacity as Registrar under the Real Estate and Business Brokers Act and his duty to the public, he could not at this time ignore the past conduct of Stubbs which led to the Stubbs' conviction, nor could he ignore the delay in granting a parole based upon the fact that Stubbs, by his own admission, was not for some time able to accept full responsibility for what had occurred.

In his evidence before the Tribunal, Stubbs clearly indicated that while he had no difficulty in conducting his real estate practice when he was registered from 1978 to 1981, it was during that period that he was involved in two retail businesses, one in Barrie and one in Yorkville in Toronto. The Yorkville business was

particularly draining financially, so much so that Stubbs was contemplating suicide. He testified that he hoped perhaps to get himself out of the financial mess by investing in some waterfront real estate.

As part of this process, he made contact with a Barrie real estate agent who had a listing of a property. He made an appointment and went with her to review the property and stated that he realized then that he could not afford to acquire that property. Because of the sympathetic approach which the real estate agent had extended to him, he indicated that he wanted to continue talking to her, drew the gun which he had in his brief case from the brief case, threatened her and then drove her to his family cottage in Haliburton where he held her at gunpoint for some time and talked. Ultimately, he calmed down and when requested by the real estate agent put the gun away and drove her back to Barrie.

The Registrar has testified that in his view the fact that Stubbs as a real estate agent threatened a female real estate agent and, in fact, kidnapped her are all circumstances which require him to look at Stubbs' past conduct very carefully. The fact of the financial pressures which were on Stubbs at that time are also to be taken into account, according to the Registrar, when considering the present real estate market conditions.

In addition, the fact that kidnapping is an extremely serious offense leaving its victims traumatized for many years and the fact of the lengthy sentence imposed are also factors which the Registrar felt had to be taken into account.

Furthermore, the fact that there was a delay in Stubbs being granted parole, partly because Stubbs himself acknowledged that he refused to avail himself of the facilities in prison, is another factor in the past conduct of the Applicant which the Registrar felt was appropriate to take into consideration.

Counsel for the Registrar referred the Tribunal to the Brenner case in the Divisional Court and urged the Tribunal to consider that the Registrar acted reasonably and, therefore, the decision of the Registrar should not be overturned when the Registrar is acting in his capacity of protecting the public good and the public perception of control by the Registrar of real estate salespersons.

The Tribunal cannot find that the Registrar has acted improperly in his decision. The Tribunal is of the opinion that the Registrar has considered all factors relating to the past conduct of the Applicant, including factors which impose terms and conditions upon his proposed supervising broker which terms and



conditions might make it very difficult for that broker effectively to supervise the work of Stubbs.

The Registrar having satisfied that onus upon him to act reasonably in making his decision, in the view of this Tribunal it was then incumbent upon Mr. Stubbs to answer the concerns of the Registrar with respect to Stubbs' past conduct, to demonstrate to this Tribunal in light of the test established by the Divisional Court in Re Brenner that his more recent past conduct overcomes the conduct which the Registrar felt disintitled Stubbs to registration at this time.

In particular, the Tribunal is of the view that in the light of Stubbs' own testimony that financial pressures and material goals were the cause of his mental breakdown in 1981 leading to suicidal tendencies and ultimately the kidnapping at the point of a gun, required Stubbs to adduce evidence for the Tribunal that could reasonably support his contention that his current emotional stability would overcome any financial pressures which he might face in the future.

The Tribunal was also faced with the fact that Stubbs was asking to be registered again as a real estate salesman within ten miles of the community where the kidnapping of the real estate salesperson occurred and yet no evidence was put forward by Stubbs with respect to the concerns or lack of concerns by members of the real estate profession in that Barrie/Stroud area. While the Tribunal recognizes that Stubbs was seeking to be registered with a broker located in Richmond Hill, nevertheless, it would be likely from time to time that he would be dealing with agents in the Barrie area. This fact would have to have some concern for the Registrar and is a matter which should have been addressed by Stubbs in his presentation to the Tribunal.

With respect to the Registrar's Proposal based upon Stubbs' financial position, the evidence of the Registrar was that the fact that Stubbs' bankruptcy related to his non real estate business endeavours and the fact that he has been discharged since January 1986 and was applying for registration as a salesman not a broker would not normally prohibit Stubbs from being registered as a salesman. The Tribunal, therefore, recognizes the fact that Stubbs has been behaving responsibly in the past few years, living within his means and working together with his wife to pay off their bills as they are incurred, and the Tribunal would not, therefore, agree with the Registrar's decision to deny registration if that were the sole reason of the Registrar.



Nevertheless, the past conduct is a substantial basis for denying registration and the Tribunal is of the view that the Registrar has acted responsibly in determining that not sufficient time has yet passed to permit Stubbs to re-enter the real estate field.

Therefore, pursuant to the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

ASHLEY OAKS HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
D.H. MacFARLANE, Member

APPEARANCES:  
JOSEPH SEREDA, representing the Applicant  
STEPHEN P. MARTIN, representing the Ontario New Home  
Warranty Program

DATE OF  
HEARING: 2 April 1990 Toronto

ORDER

The Applicant's application for adjournment is hereby granted upon the following terms and conditions:

1. That he deliver to counsel for the Ontario New Home Warranties Plan, a letter of credit drawn on the Canadian Imperial Bank of Commerce in the sum of \$47,000.00 in favour of the Ontario New Home Warranties Plan within ten days of this date pending such further order of this tribunal or other forum and without prejudice to the appellant's right to make such application as may be advised. In default, the Registrar is hereby directed to carry out his proposal.
2. Those particulars as may be demanded by counsel for the appellant and within the possession of counsel for the Program shall forthwith be made available to the appellant.
3. This matter is hereby adjourned until June 18 next at 9:30 a.m. at which time it will proceed.

SALVATORE CIULLA

APPEAL FROM A DECISION OF  
THE CORPORATION DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

BEFORE:

DAVID APPEL, Vice-Chairman, Presiding  
GORDON R. DRYDEN, Member  
LOUIS A. RICE, Member

APPEARANCES:

S. CIULLA, appearing on his own behalf

CAROL A. STREET, representing the Ontario New  
Home Warranty Program

DATE OF

HEARING: 1 August 1990

ADJOURNMENT AND ORDER

BY VIRTUE OF THE AUTHORITY vested in it under Section 16(3) of the  
Ontario New Home Warranties Plan Act, the Tribunal orders that:

1. the Ontario New Home Warranty Program re-attend  
the premises as per their request in their  
letter of July 12, 1990, to make a report  
containing their proposal for repairing of  
Schedule A(1) defects;
2. with respect to schedule A(1) and A(2) items,  
the Tribunal adjourns the hearing sine die to  
to a date to be fixed by the Registrar.

DESOTO DEVELOPMENTS LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

JOHN A. TURINGIA, representing the Applicant

BRIAN CAMPBELL, representing the Registrar under the  
Ontario New Home Warranties Plan Act

DATE OF

HEARING: 4, 5, 6, 9, 10, 11, 12, 13 July 1990

O R D E R

WHEREAS the Tribunal has heard the evidence in this matter offered by the counsel for the Ontario New Home Warranties Plan Act in Burlington on July 4, 5, 6, 9, 10, 11, 12 and 13, 1990;

AND WHEREAS counsel for the registrant, Desoto Developments Limited has requested an adjournment for at least 30 days in order to prepare the response on behalf of his client;

AND WHEREAS counsel for the parties have agreed on certain Terms and Conditions for such an adjournment;

NOW therefore, this Tribunal orders:

- 1) That this matter be adjourned, on consent, to Monday, December 10, 1990 at 9:30 a.m. at the Holiday Inn, in Burlington, and that the hearing continue from December 10 to 14 inclusive, and thereafter continue at the offices of the Tribunal in Toronto from December 17 until completed;
- 2) That the registrant, Desoto Developments Limited pay over to the Ontario New Home Warranty Program any deposits received pursuant to agreements to sell any homes now under construction which are unsold as of this date; which deposits will be retained as security until further order of this Tribunal;

- 3) That the registrant, Desoto Developments Limited undertakes not to apply for any Building Permit for residential construction in any community in which lots are now owned or where they may be purchased hereafter throughout the Hamilton or Niagara regions until the Tribunal otherwise orders.

Dated at Burlington, Ontario this 13th day of July, 1990.



NORBERT H. DUECK

HEARING TO CONSIDER AN APPLICATION TO  
VARY AN ORDER GRANTING A STAY OF THE  
DECISION OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL  
PENDING THE DISPOSITION OF AN APPEAL  
TO THE SUPREME COURT (DIVISIONAL COURT)

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member  
KEITH COULTER, Member

APPEARANCES:  
BARRY T. PAQUETTE, representing the Applicant  
JANE WEARY, representing the Registrar under the  
Motor Vehicle Dealers and Salesmen Act

DATE OF  
HEARING: 6 September 1989 Toronto

REASONS FOR RULING

In its decision of June 29th, 1989, the Commercial Registration Appeal Tribunal directed the Registrar to carry out his Proposal to revoke the licence of the Applicant, Norbert H. Dueck, as a motor vehicle salesman.

Pursuant to Section 11 of the Ministry of Consumer and Commercial Relations Act, the Applicant appealed the Order to the Supreme Court of Ontario (Divisional Court). He brought a further application to the Commercial Registration Appeal Tribunal under Section 7(9) of the Motor Vehicle Dealers Act for a stay of its Order until the disposition of the appeal. The application was heard by the Tribunal on July 13th, 1989, and the stay granted upon the following terms and conditions:

1. The Stay will be in effect for a period of eight months from the date of this Order provided that the Applicant may apply for a further extension if the appeal has not been heard by that date;

2. The Stay shall continue in effect only so long as the Applicant remains an employee of Keyeswetter Motors in Kitchener, Ontario, and only so long as the Applicant, while an employee at that dealership, does not have any cheque signing privileges or any other control over any funds received by the dealership.

One of the conditions upon which the stay was granted was that Dueck continue to be employed at Keyeswetter Motors; suspended from there, however, he now comes to this Tribunal for a further stay based on a change in his employment.

Mr. Dueck in his evidence has pointed out that it was only when his employer, Mel Keyeswetter learned of the Registrar's Proposal in late June 1989 of the Tribunal's conditions at granting the stay, that he was advised by Keyeswetter that his employment was terminated. This was an action he did not expect to be taken by Keyeswetter and had not foreseen it in his appearance before the Tribunal on July 13th. He is now employed by Royal City Motors in Guelph in the capacity of a consultant, but only on a part-time basis and is not now licensed to sell automobiles.

Counsel for the parties are in agreement on the test to be applied in any application for a stay. They have cited the case of Re: Great Northern Capital Corporation Ltd. et al and City of Toronto et al. (1973) 1 O.R. (2d) at p.160 in which it was stated:

The factors to be considered on application for stay are the bona fides of the appeal; the substance of the grounds for appeal and the hardship to the respective parties if such a stay were granted or refused.

This test was applied by the Tribunal in the first application for a stay and there is nothing in the evidence before us to indicate the circumstances of the Applicant have changed or the bona fides or substance of the grounds for appeal have been questioned.

We, therefore, must conclude that the same conditions found by the previous Tribunal obtain at this time. The only change has been in the employment of the Applicant.

We consequently consider the test to have been met and tests are not in issue, and counsel for the Registrar has raised no objection upon that ground.

Miss Weary, counsel for the Registrar, in her very able and persuasive argument defines the issue simply as one of jurisdiction. She has tendered a number of decisions to support her position that this Tribunal is functus - that it has no further jurisdiction to hear the application for a stay.

The Tribunal's authority to grant a stay is found in both the Statutory Powers Procedure and the relevant Act upon which this application is made, the Motor Vehicle Dealers Act.

Section 25 of the Statutory Powers Procedure Act provides:

25.(1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

Section 7(9) of the Motor Vehicle Dealers Act gives the Tribunal jurisdiction to grant a stay in the event of an appeal by the registrant; that stay was granted by the previous Order. The stay, however, is no longer in effect since one of the conditions no longer exists. The Order, however, contemplated the possibility or the probability of the Applicant coming back to the Tribunal for a further stay. It, therefore, considered the matter still sub judice, thereby retaining jurisdiction.

There is no prohibition in Section 7(9) which precludes the registrant from coming back to the Tribunal for a further stay, and we must therefore conclude that this Tribunal has the jurisdiction to entertain this application. We are supported in this opinion by the authority granted to a Tribunal under Section 23(1) of the Statutory Powers Procedure Act:

A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its process.

The abuse of the Tribunal's process in this instance would be a denial of our authority to decide an issue which is clearly in our jurisdiction to entertain. There will, therefore, be a stay of the Order of the Commercial Registration Appeal Tribunal upon the following terms and conditions:

1. The stay shall continue as long as the Applicant shall be employed by Royal City Motors, Guelph and in the event he is not, or wishes to change his employment, that he obtain the Registrar's permission for future employment with another motor vehicle dealer;
2. The appeal must proceed without delay;
3. If the appeal has not been heard within twelve months from the date hereof, the Registrar shall review the Applicant's registration and impose whatever conditions he may in his discretion consider necessary.

MOTOR VEHICLE DEALERS ACT  
REVISED STATUTES OF ONTARIO, 1980, CHAPTER 299

IN THE MATTER of the REGISTRATION OF  
NORBERT H. DUECK.  
as motor vehicle salesman

AND IN THE MATTER of the PROPOSAL of  
the Registrar under the Motor Vehicle Dealers Act  
made pursuant to Section 7(1) of the  
Motor Vehicle Dealers  
TO REVOKE THE REGISTRATION  
- Proposal dated: 2nd day of August, 1988;

AND IN THE MATTER of a requirement for a hearing respecting the  
said Proposal made pursuant to Section 7(2)  
- Requirement dated: 5th day of August, 1988;

AND IN THE MATTER of an Appeal to the Divisional Court  
- Appeal dated: 29th day of June, 1989;

AND IN THE MATTER of a request for a Stay of the said Decision and  
Order of the Commercial Registration Appeal Tribunal  
- Request dated: 5th day of July, 1989;

AND IN THE MATTER of an Order Granting Stay subject  
to terms and conditions  
- Order dated: 13th day of July, 1989;

AND IN THE MATTER of a requirement for a hearing  
to vary the said Order  
- Requirement dated: 19th day of July, 1989;

AND IN THE MATTER of an Order released October 29th, 1989,  
granting Stay subject to terms and conditions;

NORBERT H. DUECK

Applicant

and

THE REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN



ORDER

WHEREAS by an Order released October 27th, 1989, the Tribunal did direct a stay of an Order of the Commercial Registration Appeal Tribunal upon the following terms and conditions:

1. The stay shall continue as long as the Applicant shall be employed by Royal City Motors, Guelph and in the event he is not, or wishes to change his employment, that he obtain the Registrar's permission for future employment with another motor vehicle dealer;
2. The appeal must proceed without delay;
3. If the appeal has not been heard within twelve months from the date hereof, the Registrar shall review the Applicant's registration and impose whatever conditions he may in his discretion consider necessary.

NOW TAKE NOTICE upon the request of the Applicant for an extension of the Stay and consent of the Registrar of Motor Vehicle Dealers and Salesmen, the Tribunal hereby directs that since the appeal is now perfected extension to go until appeal heard by the Divisional Court.

889362 ONTARIO LTD.  
(SUN HOLIDAYS)

HEARING TO CONSIDER AN APPLICATION  
FOR A STAY BY THE APPLICANT OF THE  
ORDER OF THE REGISTRAR UNDER THE  
TRAVEL INDUSTRY ACT FOR  
IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
JAMES G. LESLIE, Vice-Chairman as Member  
JOHN MCGUIRE, Member

APPEARANCES:

BENJAMIN SALSBERG, representing the Applicant

DON BOURGEOIS and ALVIN TORBIN, representing the  
Registrar under the Travel Industry Act

MICHAEL D. LIPTON, representing the Trustee and Board  
of Trustees of the Compensation fund  
under the Travel Industry Act

DATES OF	26, 30, 31 July 1990	Toronto
HEARING:	23, 24, 27 August 1990	
	5, 9, 10 October 1990	
	15, 16 November 1990	

REASONS FOR RULING

On April 24, 1990, 889362 Ontario Ltd. operating as Sun Holidays was registered as a travel wholesaler by registration 3230293 and as a travel agent by registration 3230309. On the application of April 1, 1990, Durga Debi, is shown as the sole officer, director and shareholder of the registrant.

On July 14, 1990, the Registrar under the Travel Industry Act issued a Notice of Proposal to revoke registration and ordered a temporary suspension of registration in accordance with section 7 of the Travel Industry Act, R.S.O. 1980, chapter 509 as amended. Section 7 is as follows:

Where the Registrar proposes to suspend or revoke a registration, the Registrar may, where the Registrar considers it to be necessary in the public interest, by order temporarily suspend the registration and the order shall take effect immediately and where a hearing is required, the order

expires fifteen days from the date of the notice requiring the hearing unless the hearing is commenced in which case the Tribunal holding the hearing may extend the time of expiration until the hearing is concluded.

The registrant was served with the Notice of Proposal on July 16, 1990, and requested a hearing before the Tribunal on the matter of the temporary suspension. That hearing commenced before this panel of the Tribunal on July 26, 1990 and continued on July 30 and 31, August 23, 24, and 27, on October 5, 9 and 10, and on November 15 and 16, 1990. Sixteen witnesses were examined, cross-examined and re-examined during ten days and eighty-five Exhibits were received. The last day was given over to argument and submissions by counsel. As explained to the participants, this panel of the Tribunal is not seized with the issues of the merits of the Proposal, but will only deal with the question of the extension of the time of expiration of the temporary suspension.

The Registrar in his evidence gave reasons why the temporary suspension and the continuation thereof until the hearing on the merits is concluded is necessary in the public interest. In his opinion and from his investigations, the Registrar believes:

- (a) that the application for the registration of Sun Holidays was a sham with the Applicant Durga Debie, being a person of minimal qualifications,
- (b) that six days after registration, a change of address routinely processed in the Registrar's office had the business transferred to the former business premises of Nirvana Holidays which was 1105 Bathurst Street in Toronto,
- (c) that Nirvana Holidays, a business operated by 596881 Ontario Ltd. was under the direction of Binod Singh, a son of Durga Debie, and that Nirvana Holidays in its bankruptcy on March 8, 1990, will have lost the Ontario Compensation Travel Industry Compensation Fund some \$800,000,
- (d) that Lloyd Lewis has an agreement to be a shareholder of the registrant and he was the Vice-President of the holding company operating as Crown Air, which lost its licence to operate

as an airline as of February 17, 1990 and went into bankruptcy with debts of some \$8,000,000, including a debt of \$656,000 to Nirvana Holidays,

- (e) that from meetings and discussions with the various persons involved, Binod Singh, who was a son of Durga Debie and Lloyd Lewis, are in the Registrar's opinion the real directing minds of the registrant,
- (f) that false and misleading advertising has appeared in several Toronto newspapers as to the cost of travel and as to an enforceable contract with an air carrier to provide services which contract does not, in fact, exist,
- (g) that because of the business activities of Binod Singh and Lloyd Lewis in the past six months, great financial losses have occurred with much inconvenience to many passengers, and that neither Binod Singh or Lloyd Lewis would ever be approved if either or both of them applied in any form for registration under the Travel Industry Act and any business address at 1105 Bathurst Street, Toronto, would have been investigated,
- (h) that if Sun Holidays is allowed to continue the business just begun in April 1990, many hundreds of passengers may again be put at risk at great cost in money and in inconvenience if Sun Holidays operates as Nirvana Holidays did,
- (i) that the temporary suspension of the registrant's licences until a full hearing of the Proposal on its merits is necessary in the public interest and that the Registrar had substantial and compelling grounds for the exercise of his authority in making such an order.

The various witnesses brought before the Tribunal were:

- a) for the Registrar and on behalf of the Trustees of the Compensation Fund,
  - 1. Hal Burns, Registrar, Travel Industry Act
  - 2. Duncan Brown, Director, Business Regulation Branch  
Ministry of Consumer and Commercial Relations
- b) for the Applicant,
  - 3. Lloyd Lewis, former Vice-President Marketing,  
Crown Air
  - 4. Binod Singh
  - 5. Sam Singh
  - 6. Durga Debi
- c) in reply for the Registrar and on behalf of the Trustees of the Compensation Fund,
  - 7. John H. Morgan, C.A. for the Trustees in Bankruptcy  
of Canadian Aviation Express Airlines Inc.,  
carrying on business as Crown Air
  - 8. Clifton F. Wenzel, former President and Chief  
Executive Officer, Crown Air, 1983-89
  - 9. Norm Parsons, consultant to Crown Air, 1989
  - 10. Roseangela Guerra, Financial evaluator,  
National Transportation Agency
  - 11. John K. Osterhout, Chief, Division of  
International Air Licensing, N.T.A.
  - 12. Steven Paul, Financial Manager, Crown Air, 1989
  - 13. William Brennan, Founder/Owner, Crown Air
  - 14. Charles Solomon, President, Kisedee Tours  
and Travel Inc.
  - 15. Marie Dignum, Assistant-Registrar,  
Travel Industry Act



# 16. Colin Hunter, Director, Adventure Tours

Counsel for the Registrar and for the Applicant both reviewed for the panel the requirements that have been developed in guidelines for dealing with applications for a stay of an order.

These guidelines are set out H & J Auto Centre Limited operating as Town and Country Auto Centre (1984), 13 C.R.A.T. 143 and are repeated in Angela Stippinger (AGS International Travel & Services) (1986), 15 C.R.A.T. 251 as follows:

- (1) that the appeal be **bona fide**;
- (2) that the grounds of appeal be substantial;  
and
- (3) that the balance of interest is in favour  
of the applicants.

The principle of public interest is referred to in the Stippinger decision, which the Tribunal noted at page 252:

Mr. Stippinger has said that if the Order is extended then AGS would be out of business. On the other hand, the Tribunal must weigh the possible risk to the public. Given the past conduct of the Applicant and the repeated failure to meet its undertakings, the Tribunal believes that the public would not be well served if the Order was allowed to expire. Any person desiring to enter into the travel agency business must do so on the understanding that it is a regulated industry, and that all facets of the Act and its Regulations must be complied with if that business is to be allowed to continue to operate.

The attitude adopted by the Tribunal was further described in the decision of Bolos Travel Service (1987), 16 C.R.A.T. 287, where it was stated at page 288:

The Tribunal accepts that there have been no complaints filed by the general public.

However, it is concerned about the overall direction and operation of the business. In reaching its decision, the Tribunal must weight the balance of interest between the registrant and the public. In this case, the Tribunal has concluded that it would be in the public interest to extend the suspension order pending final disposition of the appeal.

The decision of 795159 Ontario Inc. (Concorde Travel Agency) heard on October 4 and released on October 19, 1990, was also cited to this Tribunal in support of the principle that the Tribunal in deciding must weigh the balance of interest as between the registrant and the public to reach a conclusion as to whether or not the public would be at any risk in allowing the registrant to continue pending a final determination of a hearing on the merits of an application.

In the circumstances of the current application, this panel acknowledges that the Registrar had good and sufficient grounds for the issuance of an order of temporary suspension and, particularly, that the balance of interest must be in favour of the protection of the general public.

The Tribunal orders, that by virtue of the authority vested in it under section 7 of the Travel Industry Act, that the time of expiration of the said order of interim suspension be and the same is extended until the hearing is concluded.

584745 ONTARIO LIMITED  
(RELIABLE CONSTRUCTION)

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REVOKE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
J. BEVERLEY HOWSON, Member  
JOHN CORSI, Member

APPEARANCES:  
RICHARD VAN BUSKIRK, representing the Applicant  
CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 5, 6 November 1990 Waterloo

ADJOURNMENT AND ORDER

UPON hearing evidence in these matters on November 5th and 6th, 1990;

AND upon agreement that further days would be required to complete this hearing;

AND upon submissions made by counsel as to terms upon which an adjournment would be granted;

NOW therefore, the Tribunal orders that

- a) this hearing be adjourned to continue at the Waterloo Inn, Waterloo on February 4 and 5, 1991 at 9:30 o'clock in the forenoon;
- b) that the Applicant pay by November 20, 1990, into the Trust account of his solicitor, Mr. Richard Van Buskirk the following sums:

1) \$10,000, as security for the outstanding total of \$16,808.65 claimed by the New Home Warranty Program.

2) \$10,500 being a security for the seven homes now under construction or completed and unsold in Kitchener, Cambridge and Mt. Forest;

and that \$1,500 be added to the aforesaid security total for each of the Applicant's lots for which a builder permit is obtained, until the decision of this Tribunal is completed.

- c) that Mr. Van Buskirk send an acknowledgement of the total funds in trust to Ms. Carol Street and advise her of any future investments with details of the property involved.

ROBERT HALE

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
LOUIS A. RICE, Member

APPEARANCES:  
DAVID SHARE, representing the Applicant  
  
CAROL A. STREET, representing the  
Ontario New Home Warranty Program  
  
M. GREENGLASS, representing A. Auciello & Son  
Custom Homes Ltd.

DATE OF  
HEARING: 1 February 1990 Toronto

# REASONS FOR RULING

This is a motion by the Ontario New Home Warranty Program and A. Auciello & Son Custom Homes Ltd. seeking an Order staying the hearing of the present appeal by Mr. Robert Hale from the decision of the Ontario New Home Warranty Program dated May 11th, 1989, which was scheduled to be heard today by this Tribunal.

The circumstances giving rise to the motion for stay are as follows:

On June 17th, 1988, Mr. Hale instituted an action in the District Court of Ontario against A. Auciello & Son Custom Homes Ltd. (hereinafter referred to as "Auciello") in which he claimed damages for alleged breaches under a construction contract entered into with the builder, Auciello.

As appears from the Statement of Claim, Mr. Hale sought damages in the amount of \$200,000, together with interest and cost of his action; the said damages resulted from construction deficiencies in the home built by Auciello. Auciello filed Statement of Defence and Counterclaim, dated January 10th, 1990 denying Hale's claim and seeking, by way of counterclaim, the sum of \$75,000 for construction extras and the sum of \$5,000 as balance owing under the construction contract.



The District Court action presently awaits the fixing of a date for hearing on the merits.

On March 22nd, 1988, Mr. Hale, through his attorneys, filed a claim against the New Home Warranty Program based on deficiencies in the construction of the home by Auciello.

On April 8th, 1988, Mr. Hale sent directly to the Ontario New Home Warranty Program an updated list of deficiencies.

On May 11th, 1989, the Ontario New Home Warranty Program issued its decision which held that certain of the deficiencies complained of were warranted by the Program; the Program estimated the cost to correct the deficiencies or compensate for the loss resulting from them as being \$16,850.00.

On May 26th, 1989, Mr. Hale appealed this decision to the Commercial Registration Appeal Tribunal stating that he was not granted sufficient compensation for the damages suffered. It is this appeal which is before us today. The New Home Warranty Program and Auciello are, however, requesting an Order for stay of the present appeal because Hale's claim before the District Court includes the same items of damages as that claimed from the New Home Warranty Program and are based on the same construction contract.

The New Home Warranty Program and Auciello allege, therefore, that the very questions sought to be determined before this Tribunal are currently before the District Court of Ontario; this could result in contradictory decisions emanating from each judicial body. It also would lead to a multiplicity of legal proceedings, each of which can be appealed to higher courts. The immediate consequence would be to give Mr. Hale two opportunities to seek judgment on one legal issue.

Matters are further complicated by the counterclaim for \$75,000 which could be used by the builder as a set off against any judgment rendered in favour of Mr. Hale with respect to his claim for deficiencies. Since the matter before this Tribunal, by the admission of the parties, is approximately \$30,000, if the builder were successful in his counterclaim, the resultant set off would eliminate any amount awarded by this Tribunal.

Should this Tribunal make any finding with respect to the counterclaim, in order to allow for any possible set off, its judgment could be rendered nugatory by a decision of the District Court, a court of superior jurisdiction. For example, if this Tribunal found the builder's counterclaim valid, the District Court could later decide it was not valid.

In similar fashion, should this Tribunal decide that Mr. Hale had proved his claim for deficiencies, the District Court could decide that no such claim had been established when it eventually hears the case. This would again render nugatory the decision by this Tribunal. In analogous manner, any decision by this Tribunal disallowing the claim of Mr. Hale could be undone by a judgment of the District Court allowing it.

Since the decision of the District Court will take precedence over that of this Tribunal, the claim by Mr. Hale should not be heard today unless it is clearly established that the claims this Tribunal shall hear are not the same as those before the Superior Court.

At the hearing of this motion, Mr. Hale was asked whether he would be prepared to remove from the Statement of Claim in the District Court, all items of deficiencies which are sought to be compensated before this Tribunal. He refused, stating that he would only accept this Tribunal's decision as being final with respect to any amounts in damages fixed for the deficiencies; that is, should this Tribunal reject his claims for deficiencies in their entirety, he reserved the right to allow those items of claim to continue before the District Court.

It is further to be noted that Mr. Hale, through his attorneys, admitted that the deficiencies alleged in his claim against the New Home Warranty Program are identical to and comprised in the global claim for \$200,000 before the District Court. In essence, it became clear during the hearing of the motion, that Mr. Hale was seeking two chances to plead the same claim, something which runs contrary to our notions of natural justice.

It has been well established by numerous judgments that in the case of concurrent litigation on the same legal matters before a superior and inferior judicial body, that the inferior tribunal will adjourn its hearing of the case until the superior judicial body has rendered its judgment.

In the present case, this Tribunal and the District Court have concurrent jurisdiction but the action before the District Court is for a much larger sum involving a greater number of claims for deficiencies and, as well, contains a counterclaim for \$75,000.

The case law on this legal point has been very consistent. In the case of Huebner v. Direct Digital Industries Ltd. et al 11 O.R. (2nd) p.372 at p.376, it was held, "It is trite law that a multiplicity of proceedings is to be avoided wherever possible."

In the case of Joseph Ciardullo rendered August 15th, 1985, this Tribunal held that it was bound by the principle of *res judicata* by a judgment of a superior court with respect to a claim before the tribunal.

In the case of Canada Systems Group (Est) Ltd. vs. Allendale Mutual Insurance Company (1983) 33 C.P.C. p.210, judgment as follows was rendered with respect to a motion for stay where there was a multiplicity of cases dealing with the same issues:

Held - The appeal should be dismissed. Montgomery J. was amply justified in granting the stay on the basis that there were overlapping factual issues in the case at Bar and in the other actions, that the risk of inconsistent results was to be avoided, and that a stay was in the public interest in view of the number of other complex cases involving enormous damage claims. Having regard to the likelihood of an award of prejudgment interest to the plaintiff, if successful, there was no substantial denial of justice in the delay occasioned by a stay.

In the case of Cooper vs. Cooper [1952] 2 All. E.R. 857 at p.861, Davies J. stated as follows:

...there is in many respects a co-equal jurisdiction between courts of summary jurisdiction, on the one hand, and the High Court, on the other...The principle, as I have always understood it, which applies to such cases, is that if on the same issue between the same parties there is an actual conflict of jurisdiction, or a reasonable likelihood or probability of such a conflict of jurisdiction, the inferior court, as a matter of obvious convenience and public policy, should not proceed with the hearing of the summons.

This Tribunal held in a judgment released October 28th, 1988, in the case of Mr. and Mrs. Ahmed that by the virtue of section 21 of the Statutory Powers Procedure Act, the Tribunal could adjourn a hearing. At page 2 of the judgment, it was held:

...We have taken the view that in the light of the action in the District Court, it would be premature for this Tribunal to proceed because the claim is fairly comprehensive and all the evidence is not available to us that would be available to the District Court. We take the view also that it is desirable, if not imperative, to avoid multiple proceedings thereby leading, to perhaps, inconsistent decisions by different forums.

We are of the opinion that the same risk exists in the case of Hale which is presently before us.

In the case of Mr. and Mrs. G. Wiley, in the judgment released December 11th, 1989, the Tribunal affirmed the decision of Ahmed and went on to demonstrate the inherent dangers of a lower tribunal rendering a decision on a matter which was before a superior tribunal. The judgment stated at p.2:

However, since the Supreme Court of Ontario is not bound by any decision made on the merits by this Tribunal, conflicting and inconsistent decisions could occur if this Tribunal was to proceed and make some Order which may likely be appealed to the Divisional Court of the Supreme Court of Ontario while that Court was proceeding to deal with the two actions which could be resolved with some contrary decisions.

The Tribunal, therefore, ordered that the claim be adjourned sine die pending the decisions in the Supreme Court of Ontario.

The case of Reginald Heasman Volume 16 CRAT 289 at p.289 made a similar holding.

Mr. Hale has chosen to institute proceedings both before this Tribunal and the District Court. The action instituted in District Court was prior to that instituted before this Tribunal. The matters raised in both proceedings are identical save that action before the District Court contains a greater number of claims, as well as a counterclaim of \$75,000 which could act as a set off to any claim won by Mr. Hale.

The result is that there is a possibility of contradictory decisions between a judgment of this Tribunal and that of the District Court, both with respect to the claim of Mr. Hale for damages resulting from certain deficiencies, as well as the counterclaim.

Under the circumstances, therefore, based on the facts in the present case as well as the case law, this Tribunal orders that this claim be adjourned sine die pending the decision of the action begun by Mr. Hale in the District Court of Ontario.



HANNIF HUSSAIN

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW THE CLAIM

TRIBUNAL:

JAMES R. BREITHAUP, Q.C., Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
D.H. MACFARLANE, Member

APPEARANCES:

HANNIF HUSSAIN, appearing on his own behalf

STEPHEN P. MARTIN, representing the Ontario New  
Home Warranty Program

DATE OF

HEARING: 19 June and 20 August 1990

ADJOURNMENT

AND UPON the agreement of the parties as to the Ontario New Home Warranty Program contacting the soil test company arranged through the engineer hired by Mr. Hussain with the intention of promptly obtaining a soil test so that progress may be made to enter and repair the septic tank system in issue within the next two months, AND with that testing immediately arranged upon the signing by Mr. Hussain of the requested acknowledgement to give authority for the Ontario New Home Warranty Program to enter upon his property in order to investigate this situation,

THE TRIBUNAL adjourns the hearing sine die to be brought back on 10 days' notice one party to the other, or by the Registrar, to a date to be fixed by the Registrar.

LEON KOZIEROK

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding  
TIBOR PHILIP GREGOR, Member  
LOUIS A. RICE, Member

APPEARANCES:  
NEIL J. PERRIER, representing the Applicant  
  
CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF  
HEARING: 28 November 1989 Toronto

REASONS FOR RULING

This is an application by way of claim by Leon Kozierok for damages under the Ontario New Home Warranty Program arising out of the construction of a home at 226 Forest Ridge Road, Richmond Hill.

The matter before the Tribunal this day, however, is a motion by the Program to dismiss the claim of Leon Kozierok on the basis that the owners are not entitled to recover because the definition of owner and builder under the Act has not been met. In the alternative, inasmuch as an application under the Construction Lien Act has been issued and is being vigorously contested in the Supreme Court of Ontario, if the Tribunal finds that Mr. Kozierok is entitled to a claim, that there be a stay of the proceedings under this claim until the final disposition of the Construction Lien action on the basis that subsection 14(2) provides that the Corporation in assessing damages must take into account any benefit, compensation or indemnity payable from any source.

The facts of the case initially are rather straightforward. The Kozieroks met with Mr. Paul Bordo of Barabco Construction and were shown a home on Russell Hill Road in Toronto constructed by Barabco Construction, as an example of the work which Barabco Construction had done. The Kozieroks were apparently given a rough indication that the cost of construction of the house

on the lot which was owned by the Kozieroks would be approximately \$125 per square foot. On the basis of this preliminary meeting, Barabco Construction prepared a Canadian Construction Documents Committee Form 3 Standard Cost Plus Contract dated July 21st, 1987 providing for commencement of work by August 4th, 1987 and completion by March 22nd, 1988. Appended to this contract document were a number of schedules. Among these schedules were drawings and specifications prepared by an architect as Schedule A, Builder's Specifications as Schedule C and the Ontario New Home Warranty Program Addendum to Agreement of Purchase and Sale as Schedule G. With respect to the Builder's Specifications, this contained some 75 very specific items relating to the construction of a completed home for the Kozieroks. It should be noted that if all 75 items had been completed by Barabco Construction, a completed house would have been turned over to the Kozieroks.

It should be further noted that there is substantial emphasis in these Builder's Specifications to choice of products from "builders samples". The only item which appears to have a possibility of being excluded is Item 18 which provides as follows:

Custom designed kitchen cabinets and counters built from plastic laminate from Builder's samples or to allowance of \$17,000 - corion counters.

This would seem to indicate that there might be a deletion of this item.

Item 50 also indicated that exterior work such as landscaping, walkways, paved driveway and sod would not be included. Item 54, however, indicated as follows:

Barabco Construction is a Registered Builder with the Ontario New Home Warranty Program. Barabco Construction will submit an application on your behalf to register your new home; however, all fees therefor will be payable by the Owner.

Mr. Kozierok in his evidence indicated that he had reviewed this Schedule C at great length with Mr. Bordo before signing and that the handwritten portions of the Builder's Specifications had been inserted by Mr. Bordo and initialled by Mr. Kozierok. Schedule G to the Agreement is the Statutory Addendum to the Agreement of Purchase and sale established under Regulation 728 of the Ontario New Home Warranties Plan Act pursuant to Section 12 of the Regulation which provides that:

The registrant shall furnish to the Registrar proof that the following Addendum forms part of every purchase agreement within the meaning of clause 1(r) of Regulation 726...

Section 1(r) of Regulation 726 reads as follows:

"purchase agreement" means an agreement between a vendor and any person providing for the purchase by such person of a home;

Contained in that Schedule G was an identification of the builder's registration number and address as is required under the Act.

It will, therefore, be seen that at the time of the execution of this cost plus contract, both the Kozieroks and Barabco Construction intended that Barabco Construction would be a builder as defined under the Ontario New Home Warranties Plan Act in Section 1(a):

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner;

Barabco Construction would also qualify as a vendor under Section 1(n) of the Act which reads as follows:

"vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

Counsel for the Program acknowledged that, in fact, at that initial point in time the warranty under the Ontario New Home Warranties Plan Act would apply for the benefit of the Kozieroks and, in fact, the enrolment fee was paid by the Kozieroks and remains with the Program at the date of this hearing.

Mr. Philip Robins, one of the partner of Barabco Construction, testified before the Tribunal that he proceeded to supervise the construction of the home including obtaining tenders, reviewing these with the clients, letting contracts and scheduling work. Construction commenced in September 1987. He indicated that

because Mr. Kozierok had some connections with suppliers that certain products were provided, such as the windows, which were installed by Barabco's workers. He testified that as the work progressed, there were a number of matters which the Kozieroks took over. Barabco on the other hand continued to do work in conjunction with the work being done by the Kozieroks' subcontractors.

In cross-examination, he did acknowledge that originally it was contemplated that Barabco would build a completed home. He also acknowledged that there were a lot of difficulties with this particular house. He also indicated that he knew that there would be some delay in completing the construction. By September 1988, the house was still not constructed although the Kozieroks were living in the home. The living room, in particular, was incomplete.

In his evidence, Mr. Kozierok was forthright and clear in his testimony. He indicated that both he and his wife were busy professionals and that they contracted with Barabco on the basis of the work which they had seen done by Barabco because they wanted the job to be well done and did not want to have to be involved directly in the construction. He indicated that as the work progressed, the procedures being followed by Barabco were not satisfactory and that in some cases, the quotations being obtained were substantially higher than could be obtained for comparable products. He indicated that, in addition, he got into the construction because there were substantial delays and the only way the work could be completed was if he did get involved.

Counsel for the Program submitted to the Tribunal that certain provisions of the contract, being a cost plus contract, permitted the owner to let separate contracts in connection with the project (Section 9.1). Counsel also pointed out that Section 5.2 of the contract provides that if the contractor should neglect to prosecute the work properly or failed to comply with the requirements of the contract to a substantial degree, that the owner may terminate or correct the default.

Counsel for the Program argued that in the case of a fixed price contract, a fixed amount of work and a fixed fee are established and, therefore, a fixed price contract would be covered under the Program warranty. Counsel submitted, however, that in the case of a cost plus contract, while the initial intent was that a completed home would be constructed and, therefore, the construction initially would be warranted under the Act, intent is not the governing factor but rather reality is what governs. Counsel submitted that if, in fact, on a cost plus contract the builder did complete all of the work and deliver the house to the



owner, such house so constructed would be covered under the Act's warranty but if, in fact, the builder did not complete all of the work and the owner took over some portion of the work whether substantial or not, then the builder would not be a "builder" under Section 1(a) of the Act because he has not completed the performance of all of the work and the supply of all of the materials necessary to construct a completed home.

If the argument of counsel for the Program were to prevail, no contracting party entering into a cost plus construction contract for a home could ever be certain that he had a warranty under the Ontario New Home Warranties Plan Act until the very end of the completion of the contract. The Tribunal views this as not only being inequitable but, in fact, contrary to law. The Legislature in its definition of builder under Section 1(a) uses the words "undertakes the performance of all the work and supply of all the materials necessary to construct a completed home..." (emphasis added). The Legislature did not say that a builder must complete the performance of all the work and supply of all the materials. Moreover, under clause 13(ii)(a) of the Act, the Legislature has provided that the warranty does not apply in respect of materials, design and workmanship supplied by the owner. Here, the Legislature has clearly used a conclusive reference in the word "supplied" and not an intended reference such as "undertakes" in Section 1(a). In the view of this Tribunal, therefore, Barabco is a "builder" under the Ontario New Home Warranties Plan Act and this house is subject to the Program's warranty.

In dealing with the cases submitted by counsel, the Tribunal has the following comments. In the case of Ray McDiarmid, 17 CRAT p.148, McDiarmid entered into a number of contracts for various parts of construction of his home. The Tribunal in that case found that none of the contracts on their own contemplated a completed house and, in fact, McDiarmid did much of the work himself. As far as the Kozieroks and Barabco Construction are concerned, the contract was a formal construction document which on its face contemplated a single contract for construction of a completed home with all of the materials to be supplied by the builder. The fact that subsequently certain materials were supplied by the owner of the lot and that he had to engage others to do the installations does not change the nature of the initial single contract.

In the case of Re Bond, 17 CRAT 94, again there were three contracts in which the Tribunal hearing the Bond case found amounted to the sale to Bond of a collection of services and chattels, but in their totality creating a whole home. Again these facts are quite contrary to the facts relating to the Agreement in

this particular case. In *Re Morton*, the builder in the case represented itself to be registered under the Ontario New Home Warranties Plan Act and exacted a registration fee from the Mortons. In neither the Bond nor McDiarmid cases were the builders registered under the Act. In the Morton case, the builder was not, in fact, registered although he had previously been so. In the Morton case, however, and distinguishing it from the Bond and McDiarmid cases, the contract specifically contemplated the construction of a completed home with a few minor exceptions for material to be provided by Mr. Morton. This case is much more consistent with the facts in the present case and in actual fact, Barabco Construction was a registered builder which is acknowledged by the Program.

An argument was raised that the Program having accepted the fee paid on behalf of the Kozieroks in respect to the builder, Barabco Construction, is estopped from denying that Barabco Construction is, in fact, a builder. This is an issue which does not have to be dealt with by this Tribunal in view of the fact that the Tribunal has found that as a matter of fact, Barabco Construction is a builder and, therefore, must be registered with the Program and did receive and pay over to the Program an enrolment fee for this particular home. If this Tribunal had found, however, that Barabco Construction had not been a builder, the mere representation by Barabco Construction to the Kozieroks would, in the opinion of this Tribunal, not be sufficient to assist the Kozieroks. The decision of the Queen in right of Ontario vs. Baig, (1979) 23 O.R. (2nd) 730 is authority for the fact that a defense of estoppel cannot be taken in effect to repeal or amend a statute.

On the basis of the foregoing, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Act, the Tribunal hereby dismisses the motion of the Ontario New Home Warranty Program with respect to the right of the Applicants to bring this claim under Section 14 of the Ontario Plan Act.

With respect to the second motion brought by the Program, regarding the stay of proceedings, the Tribunal has commented already that in assessing the claim, the Program under subsection 13(2) of the Act is required to take into consideration any benefit, compensation or indemnity payable from any source. As from the pleadings filed with the Tribunal, it appears to the Tribunal that the issues may thoroughly be considered in the Construction Lien action and a determination made regarding work done by Barabco and the Kozieroks which may result in compensation being paid to the Kozieroks, it appears to this Tribunal that many of the issues may be resolved in the Construction Lien action on the basis of which the Program would then be able to make a

determination as to the amount of compensation, if any, to be paid to the Kozieroks.

To allow the proceedings before this Tribunal to continue when a decision of a higher court may very well overrule the findings of this Tribunal would not be fitting. On the basis of the decision made in Re: Ahmed (1988) CRAT and the cases cited therein, namely, Heubner vs. Direct Digital Industries Limited (1975) 11 O.R. (2nd) 372 and Canada Systems Group (Est) Ltd. vs. Allendale Mutual Insurance Company (1983) 33 C.P.C. 210, it appears to this Tribunal that a stay of proceedings should be granted until the final disposition of the Construction Lien action in Barabco Construction as Plaintiff and Leon Kozierok and others as defendants, and this Tribunal by virtue of the authority vested in it hereby so directs with the provision that upon final disposition of the said action, this claim may be brought on upon application by either party to the Registrar of the Commercial Registration Appeal Tribunal.

Note: The above ruling was appealed to the Divisional Court. The endorsement of the Supreme Court is noted in this volume at page 599.

MR. AND MRS. E. LACIKA

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
J. BEVERLEY HOWSON, Member  
LOUIS A. RICE, Member

APPEARANCES:

E. LACIKA, appearing on their behalf

CAROL A. STREET, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 12 January 1990

Toronto

REASONS FOR RULING

Prior to opening the hearing, it was brought to the attention of the members of the Tribunal that Mr. Rice, the member representing the building industry was not only well acquainted with the offices of the company known as Geranium Homes, but had also participated in some of the profits of that Company.

Under the circumstances, Mr. Rice asked to be disqualified from participating in the hearing and the remaining members were in complete agreement with his position. Miss Street representing the Program and Mr. Lacika representing himself have been advised of the situation and both have agreed that the hearing should be brought before another panel at the next available date which would appear to be January 19th next.

All parties, therefore, consenting thereto, this matter shall be heard on **Friday, January 19th, 1990 at 9:30 a.m.**

MERIVALE TRAVEL AGENCY LIMITED

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION  
AND FOR AN ORDER OF IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding  
JAMES G. LESLIE, Vice-Chairman as Member  
JOHN MCGUIRE, Member

APPEARANCES:

D. WRIGHT, its agent

GAIL MIDANIK, representing the Registrar under the  
Travel Industry Act

DATE OF

HEARING:

26 July 1990

Toronto

ADJOURNMENT AND ORDER

Upon hearing submissions on behalf of the Applicant and the Registrar, the Tribunal

- i. orders, that by virtue of the authority vested in it under section 7 that the time of expiration of the said order of interim suspension be and the same is extended until the hearing with respect to temporary suspension is concluded;
- ii. and adjourns the hearing with respect to the continuation of temporary suspension until Friday, the 10th day of August, 1990 at 10:00 a.m., at which time on the consent of the parties, another panel of this Tribunal will hear the applications of the registrant to revoke the order of immediate temporary suspension.



PYL-CHEM HOTEL LIMITED  
(ORCHARD PARK TAVERN)

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCE  
FOR A PERIOD OF FIVE DAYS

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
J. BEVERLEY HOWSON, Member  
NEIL E. VOSBURGH, Member

APPEARANCES:

MARIE MOUNTJOY, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 4 June 1990

Toronto

RULING

UPON hearing the submissions made on behalf of Pyl-Chem Hotel Limited, Licensee of Orchard Park Tavern requesting a stay of the Order, and upon hearing counsel for the Liquor Licence Board, by virtue of the authority vested in it under Section 12(6) of the Liquor Licence Act, the Tribunal hereby grants the application for a stay for two weeks and orders that the liquor licence of the Pyl-Chem Hotel Limited in respect of the premises operating as the Orchard Park Tavern, Toronto, be suspended for a period of five (5) days, commencing at the opening hour of business on Wednesday, June 20, 1990 and continuing until the closing hour of business on Sunday, June 24, 1990; and orders that the suspension placard be prominently displayed during the entire term of the suspension period.

SUDERSHAN RANA  
and  
SHIPRA RANA

APPEAL FROM A PROPOSAL(S) OF THE  
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION  
TO REFUSE TO GRANT REGISTRATION  
of Sudershan Rana

TO REVOKE THE REGISTRATION  
TO REFUSE TO GRANT RENEWAL OF REGISTRATION  
of Shipra Rana

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
A. DONALD MANCHESTER, Member

APPEARANCES:

S. RANA, appearing on his own behalf

ALISTAIR RISWICK, representing Shipra Rana

GAIL MIDANIK, representing the Registrar of  
Real Estate and Business Brokers

DATE OF

HEARING: 6 June and 12 1990

Toronto

RULING

The appeals of Sudershan Rana and Shipra Rana coming on for hearing on June 6, 1990 and set over for further evidence until this date, and it now appearing that a further adjournment is desirable for a proper disposition of the matters, and upon consent of counsel for the Registrar and for Shipra Rana and upon the consent of Sudershan Rana:

These matters are hereby adjourned to August 30 next at 9:30 a.m. upon the following terms and conditions:

1. The Applicant Sudershan Rana is hereby given 15 days from this date to obtain a sponsoring broker, his previous employment with Belstar Realty Limited having been terminated on June 25 during the

continuation of these proceedings. In the event the required sponsorship is obtained within that period, he shall notify the Registrar and file the necessary application forthwith. In the event of default in obtaining the required sponsoring broker within that time, the Registrar is hereby directed to carry out his Proposal.

2. The motion of counsel for Sudershan Rana that he be removed from the record is hereby granted.

JOSEPH F. SAPIANO

APPEAL FROM A DECISION OF THE CORPORATION  
DESIGNATED FOR THE PURPOSES OF THE  
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding  
HELEN J. MORNINGSTAR, Member  
LOUIS A. RICE, Member

APPEARANCES:

J.F. SAPIANO, appearing on his own behalf

M. Di FRANCESCO, representing Ledi Properties

STEPHEN P. MARTIN, representing the  
Ontario New Home Warranty Program

DATE OF

HEARING: 30 May 1990

Toronto

REASONS FOR RULING

This is a matter in which the Applicant, Joseph Sapiano comes to the Commercial Registration Appeal Tribunal on one issue as to whether or not the trim around an archway, a mahogany trim, should be the subject of a claim for which the Ontario New Home Warranty Program should either be liable to repair or complete according to the understanding of Mr. Sapiano in making his contract with the builder.

A Mr. Di Francesco has appeared on behalf of the builder which has now been made a party to this proceeding and Mr. Di Francesco has brought a motion before the Tribunal in which he points out that the Tribunal may have no jurisdiction to hear this issue because it is a matter of contract between the builder and the owner.

Having heard some evidence from Mr. Sapiano and having had the opportunity to examine some of the documents, including the Offer to Purchase, the Tribunal is of the view that the motion certainly has merit and should be sustained.

There is a precedent for this decision in the matter of Brian Krist which is found at Volume 17, CRAT Summaries of Decisions (1988) p.136 in which it was decided that it was not the business of the Tribunal to decide issues which were solely the

subject of a dispute between the builder and the owner, and a matter of contract.

The Ontario New Home Warranty Program does not come into that aspect of these contractual relations between the parties. That, in our view, has always been a proper subject for a court of law in which Mr. Sapiano has his proper remedy.

Under the circumstances, we must allow the motion. It is not a denial of Mr. Sapiano's claim and I wish him to understand that. It is simply a matter that this Tribunal has no jurisdiction to hear any issue which is solely reserved for a court to determine whether or not a matter of mahogany trim, or whatever other subject it is, involving the materials in a home, are the proper subject of a contract, an agreement, or whether they are not.

That is not our purpose here and I must advise Mr. Sapiano that whatever decision is made now is certainly without prejudice to him to take whatever proceedings he wishes in the proper forum.



795159 ONTARIO INC.  
(CONCORDE TRAVEL AGENCY)

APPEAL FROM A PROPOSAL OF THE  
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION  
AND FOR AN ORDER OF IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding  
J. BEVERLEY HOWSON, Member  
GLORIA ANEVICH, Member

APPEARANCES;  
HARRY GHANTOUS, its agent  
JAMES GIRLING, representing the Registrar under the  
Travel Industry Act

DATE OF  
HEARING: 4 October 1990 Toronto

REASONS FOR RULING

This is an appeal from the Proposal of the Registrar dated September 14, 1990 pursuant to Section 6(1) of the Act to revoke the registration of the registrant and more particularly, the Order which the Registrar made under the Act for temporary suspension in accordance with Section 7 of the Travel Industry Act.

That Order was dated September 14, 1990, and pursuant to that Section we are here to consider the Order and whether that suspension should be continued until this matter is heard in full by this Tribunal.

The evidence presented to us on behalf of the Registrar established conclusively that the licence to operate of this company, operating as Concorde Travel Agency, should remain suspended until the matter is heard in full on its merits.

The Registrar established a prima facie case that this registrant cannot be financially responsible in the conduct of its business and the response before us of the registrant not only did not answer that case, but also disclosed other grounds which support the Registrar's opinion - that it was necessary in the public interest to suspend this registration.

The only financial statements received by the Registrar's office from Concorde did not comply with the Regulations or meet

the requirements stipulated by letters from auditors on behalf of the Registrar sent to the registrant on January 10, May 18 and June 23, 1990. At this hearing the registrant produced a letter from someone who was not a chartered accountant to which was attached what purports to be certain interim financial statements as of September 15, 1990. These were signed only by Mr. Ghantous, the President of the Company, and it was stated in the letter that the writer had not performed an audit and had completed the statements only from information forwarded by the Company. Furthermore, there were no supporting books or records.

There was also evidence of a number of cheques issued by the registrant which were dishonoured by the bank for insufficient funds and there was clear evidence that the registrant had used monies for purposes of its own which had been paid to it by clients for travel services. In one case, it did not pay the premium it had collected for some travel insurance to the insurance company at the time required to cover the insurance, although it did pay this money over later. In another case, it kept a sum of over 6,000.00 dollars which had been paid by clients for a trip, the clients had to pay a second time to other parties to go on their trip and were put to a good deal of inconvenience, trouble and extra expense. This money has not yet been paid by the registrant and there appears to be a valid claim for the same against the compensation fund.

Finally, mention should be made of the responsibility of the Registrar under part (iii) of clause (c) of subsection 1 of Section 4 of the Travel Industry Act. The evidence established that Concorde carried on business as a travel agent after being notified of its suspension herein by the Registrar. Specifically, Mr. Ghantous said that some of the bookings listed on the last sheet of Exhibit 19 were booked after that time.

The proper legal approach to the issue which the Tribunal must decide here is set out in a judgement of this Tribunal in the case of Appleby Travel Services Limited, reported in 1989 (18 C.R.A.T. p.416) in which the Chairman cites with approval and quotes from a case of Steve Aslanidis (Thessaloniki - SKG Travel Service) reported in Volume 16 C.R.A.T. p. 284 where the Tribunal said on page 285:

The Tribunal in deciding must weigh the balance of interest as between the registrant and the public, and in this case, the Tribunal has concluded that the public would not be at any risk pending final determination of this issue.

In weighing the balance of interest, as between this registrant and the public in the case before us, the Tribunal has concluded that the public would be at risk if this registrant were to continue in business pending final determination of this issue. Therefore, this Tribunal adjourns the hearing sine die to be brought back on 10 days' notice upon a date to be fixed by the Registrar.

The Tribunal further orders that by virtue of the authority vested in it under Section 7 of the Travel Industry Act, the time of expiration of the Order of Interim Suspension be and the same is hereby extended until the hearing is concluded.

ISMAT SHAH

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT  
TO REFUSE TO RENEW REGISTRATION

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter commencing the 15th day of June 1990;

AND WHEREAS the applicant Ismat Shaw (incorrectly named as Zia Development Corporation in the Appointment for and Notice of Hearing dated April 25, 1990) has requested an adjournment of the hearing to a date to be fixed by the Registrar;

AND WHEREAS the Respondent, Ontario New Home Warranty Program has agreed to consent to the adjournment on certain terms and conditions:

THEREFORE, the Tribunal orders that the hearing be adjourned to a date to be fixed by the Registrar;

AND that the Applicant Ismat Shah is restrained from building or selling any home, as defined in the Ontario New Home Warranties Plan Act pending the return of the hearing;

AND that the Applicant Ismat Shah is directed to provide the Respondent New Home Warranty Program with security in the form of a bond or certified cheque in the amount of \$500.00 on or before 4:30 p.m., Friday, June 29, 1990, which security shall be delivered to the Respondent's solicitors and shall be held by the Respondent's solicitors pending the return of the hearing;

AND that, if the applicant Ismat Shah fails to comply with the Order of restraint or fails to provide the security as ordered herein, the Registrar of the Warranty Program shall be directed to carry out the Proposal set out in the Notice of Proposal dated September 25, 1989, and any security posted by the Applicant Ismat Shah shall be forfeited to the Respondent.

DATED at Toronto this 22nd day of June, 1990.

JOHN SMART

APPEAL FROM A DECISION OF THE  
LIQUOR LICENCE BOARD OF ONTARIO

TO ALLOW THE LICENSEE TO OPERATE AN OUTDOOR  
PATIO AS PART OF ITS LICENSED PREMISES  
AT 912 BANK STREET, OTTAWA

RE:  
FAT ALBERT'S RESTAURANT

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding  
TIBOR PHILIP GREGOR, Member  
THOMAS KROEGER, Member

APPEARANCES:  
JOHN SMART, appearing on his own behalf  
ERNEST TANNIS, representing the Licensee  
RICHARD E. KULIS,  
representing the Liquor Licence Board

DATE OF  
HEARING: 14 May 1990 Toronto

REASONS FOR RULING

In August, 1989, John Smart objected by letter to the granting of a patio licence to Fat Albert's Restaurant at 912 Bank Street, in Ottawa. He stated that he was living one and one-half blocks from the location, referred to traffic and noise increase, and referred to other concerns through a letter from the Hon. Richard Patten, M.P.P., and by references to a Senior Citizen's Centre and to a large apartment building, both close to the proposed location. After a public meeting on August 31, at which Mr. Smart was the only objector, the application for the patio licence was refused and on appeal, a hearing took place in Ottawa on March 27, 1990. Again, Mr. Smart was the only objector present, and he repeated in his letter of March 20, 1990, his earlier concerns.

The Applicant provided letters from Mr. Patten and from the management of both buildings that apparently showed no concerns about the granting of a patio licence by them.

At the public meeting, Mr. Smart presented certain documents, was questioned on them, examined the Applicant's documents and asked questions. He received letters from the Liquor Licence Board thereafter and appeared at the appeal hearing on March 27, 1990.



Again he filed documents, gave evidence under oath and was cross-examined while he examined and cross-examined documents and witnesses of the Applicant.

When the oral decision to grant the licence was made, Mr. Smart asked Mr. Richard Kulis, the solicitor for the Liquor Licence Board what the procedures were for appealing the decision and he was informed of them. No objection was advanced by Mr. Kulis to Mr. Smart's wish to appeal on the basis that Mr. Smart had no standing as a party.

When Mr. Smart wrote on April 3, 1990 to the Registrar of this Tribunal to appeal the decision as to the granting of the patio licence, Mr. Kulis wrote in reply on April 10 to state that Mr. Smart "was not made a party to the proceedings and has no standing, therefore, to request an appeal".

The sole matter before this Tribunal today is for us to decide whether or not Mr. Smart has legal status within the Liquor Licence Act to advance an appeal.

In his presentation, Mr. Smart stated that a patio licence would threaten the value of his home and property, and that he might have to move as he claimed others had done to avoid the increased stress in the area. By the actions of the Board, Mr. Smart believes that he has been treated throughout as a party from August 1989 to March 1990.

Counsel for the Applicant presented four reasons why Mr. Smart is and should not be a party to these proceedings. They are as follows:

I. By Section 12(3) of the Liquor Licence Act,

Every person upon whom notice of a hearing is served and any other person added by the Board is a party to the proceedings.

Mr. Smart was not served with a Notice of Hearing and was not added by the Board. Mr. Smart received a letter from the Liquor Licence Board on January 30, 1990 which stated:

This is to advise you that a Hearing pursuant to the Board's Notice of Proposal dated September 14, 1989, to Refuse to Issue a Patio Licence to the applicant in respect of the above-named premises, has been scheduled for Tuesday, March 27, 1990, at 9:30 am.

You are invited to attend this Hearing which will be held at the Rideau Centre, Trillium Room, 10 Rideau Street, Ottawa.

This will avail you an opportunity to voice your objections to the issuance of the licence for this establishment. You may, of course, bring any other interested persons with you to the proceeding.

Mr. Smart did not formally ask to be added as a party at the hearing and is so only an interested person and an intervenor.

While Mr. Smart was given every courtesy, he did not choose to have counsel with him and the failure to seek to be made a party is his own responsibility and goes beyond any basic duty which the Board may have to keep a citizen informed of the details of the Liquor Licence Act. In any event, Mr. Smart was on his own and the sole objector.

II. Even if Mr. Smart is considered to be a party, he certainly is not "aggrieved" by the decision to grant the patio licence and, pursuant to Section 14(1) of the Liquor Licence Act has no status to appeal.

III. There is no public interest in Mr. Smart's appeal and only a possible private loss of property value which is only a speculation. The Liquor Licence Board did consider this issue, and as Mr. Smart was the only objector, obviously found his arguments to be without merit.

IV. In both his letters before the public meeting and the hearing, Mr. Smart referred to the expected concerns which he stated others have, but these were refuted and no one else is complaining about the patio licence although the two buildings to which he refers are almost adjacent to the restaurant location. So Mr. Smart is acting only for himself as he is one and a half blocks from the restaurant.

Counsel for the Liquor Licence Board acknowledged that when Mr. Smart's letter of appeal was received, Mr. David Purvis, one of the two members who conducted the hearing, told him that Mr. Smart was not a party. This was certainly settled after the event of the hearing and the oral decision to grant a licence which lead

to the attempt to appeal by Mr. Smart. Counsel reviewed the practice of the Liquor Licence Board to serve Notice of Hearing on parties and to send letters as quoted earlier herein to other interested persons.

The Tribunal agrees that under the clear reading of Section 12(3) of the Liquor Licence Act, Mr. Smart was not formally made a party to the proceedings. But we also conclude that because of his involvement in the proceedings and the discussion about an appeal, there was some confusion in Mr. Smart's understanding of his status and in what he may have been led to conclude about that status.

We also note the use of the word "aggrieved" in Section 14(1) and conclude that Mr. Smart believes he is aggrieved because of a loss of quiet enjoyment of his home and a possible lowering of property values, as well as by greater traffic and noise strains in his neighbourhood.

In order to be fair in this particular matter, the Tribunal has decided to exercise the discretion given under Section 14(5) of the Liquor Licence Act and specify that Mr. John Smart is a party to the proceedings herein and can accordingly proceed with an appeal of the decision of March 29, 1990, to grant the patio licence.

However to do equity to the Applicant, we are guided by the principles set out in the Tribunal's decision of Burns H. Proudfoot (1986) 15 CRAT 270, which is an appeal from the Proposal of the Liquor Licence Board of Ontario concerning a licence to be granted to Piccolo Castello Trattoria Restaurant. The eventual appeal from the decision of the Liquor Licence Board with respect to the granting of that licence appears in the same volume at page 61.

The facts of that decision are virtually the same as those before us today, and the Tribunal concluded at page 275:

Clearly, Mr. Proudfoot was a party to the proceedings. The letter advising him of the date and place of the Board's hearing was addressed to him personally; the decision was sent to him in his personal capacity; he attended the Board hearing and the Tribunal accepts his statement that he spoke on his own behalf. It may well be that, in part, he also spoke on behalf of others, but that of itself would not alter or change the capacity in which he appeared in the first instance. The

Tribunal therefore finds that Mr Proudfoot was a party to the proceedings before the Liquor Licence Board in his personal capacity.

The second issue is whether Mr. Proudfoot is aggrieved by the decision of the Board. The interpretation of the word "aggrieved" as used in the Liquor Licence Act has been previously considered by the Liquor Licence Appeal Tribunal. In the Frank's Restaurant ruling, the Tribunal states: "The Tribunal is of the opinion that anyone whose concepts of needs and wishes have been decided against is aggrieved". The Tribunal finds that Mr. Proudfoot is aggrieved by the decision of the Board.

The Tribunal, therefore, has jurisdiction to hear the appeal brought by Mr. Proudfoot in his personal capacity.

Under Section 25(1) of the Statutory Powers Procedure Act, an appeal from a decision of a tribunal, in this case the Liquor Licence Board, to another appellate tribunal would operate as a stay of the matter unless this Tribunal otherwise orders.

Counsel for the licence holder has asked this Tribunal to exercise that authority. The Tribunal has considered the decision of the Liquor Licence Board and has weighed the possible negative impact of that decision, not only on the applicant, Mr. Proudfoot, but on the public in the area, against the negative impact on the licence holder. Without in any way determining the merits of the appeal itself, the Tribunal is of the opinion that an order under section 25(1) is appropriate in the circumstances.

In the Proudfoot decision, reference is made to the Temple decision of April 1983 as being unreported. That decision is now found in (1989) 19 CRAT 34.

Accordingly, in our decision today, we further agree that an order under Section 25(1) of the Statutory Powers Procedure Act is appropriate.

By virtue of the general authority vested in it, the Tribunal finds that the Applicant John Smart is entitled to require the Tribunal to hold a hearing pursuant to Section 14 of the Liquor Licence Act and that pursuant to Section 25(1) of the Statute in Powers Procedure Act, the appeal filed by the Applicant will act as a stay of the Order of the Liquor Licence Board in the matter.



## VALUE VACATIONS LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR  
UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION AND  
FOR IMMEDIATE TEMPORARY SUSPENSION

TRIBUNAL: JAMES G. LESLIE, Vice-Chairman, Presiding  
MICHAEL E. LERANBAUM, Member (absent Nov. 29/90)  
KEITH COPPARD, Member

APPEARANCES: BENJAMIN SALSBERG, representing the Applicant  
JANE WEARY, representing the Registrar under the  
Travel Industry Act

DATES OF HEARING: 5, 7, September; 12 October; 29 November 1990;  
28 January 1991. Toronto

REASONS FOR RULING

There is a lack of jurisdiction in this Tribunal since the Applicant has not renewed his registration which lapsed on the 14th day of December last. He, therefore, has no status today before the Tribunal although he did at the time of this original application have status. He is neither now an Applicant nor is he a registrant and if this Tribunal were to continue this hearing, which is a hearing to determine whether or not the suspension is to continue or be lifted, the Tribunal no matter which way it decided could afford Mr. Pinnock no relief. It has no jurisdiction to grant him a licence and were the Tribunal eventually at the close of the hearing to decide that Mr. Pinnock's suspension should be lifted, it cannot give him a licence to continue in the travel business because he must apply as a new applicant. Under the circumstances, it would avail us nothing and avail Mr. Pinnock nothing for the hearing to continue.

Ms. Weary has presented the Barrette case and there are other similar cases but I might refer you to the case of Norquay Homes which is found in volume 18 of the Commercial Registration Appeal Tribunal Summaries of Decisions. I refer to page 244, where the issue of jurisdiction had been raised and the reference is to the Roncarelli v. Duplessis [1959] S.C.R. 121; that was the Quebec Jehovah witness case as you may recall. In that case, Mr. Justice Rand said:

In public regulation the discretion is not absolute or untrammelled and that there is always a perspective within which the statute is intended to operate so that there should be no clear departure from its lines or objects.

.....

It has been held that even if made in good faith with the best of intentions, a departure by a decision-making body from the objects and purposes of the statute pursuant to which it acts, is objectionable and subject to review by the courts.

.....

Considering a public administration that has such power, that is to refuse to allow a person to continue a calling which would otherwise be legitimate but for regulation, the grounds for refusing to cancel the permit must be clearly within the scope and purposes of the Act.

This Tribunal, which acts under the Ministry of Consumer and Commercial Relations Act, which has as its authority the Statutory Powers Procedure Act and in this particular case, the Travel Industry Act, has no jurisdiction beyond that given to it by the Act and the Regulations. The Regulations in this case clearly state that the registrant, not having renewed his licence is no longer a registrant.

Section 22(1) states that:

Every registration expires on the date shown on the certificate of registration unless an application for renewal of registration in a form provided by the Minister, together with the appropriate fee prescribed in section 4, is filed with the Registrar prior to the date

of expiry.

The Applicant has not done that and as a result, in our view, he has no status before this Tribunal. We find, however, a troubling question arises and that is, what would have happened had he submitted an application for renewal prior to December 14? He is at present under suspension. What would the position of the Registrar have been at that time since a registrant whose licence is suspended temporarily makes application for renewal of registration. I don't know the answer to that. Perhaps the director of the travel industry or the Registrar will have his own view on that point. It, nevertheless, does not change the position of the Tribunal where today we must find the Tribunal has no jurisdiction to continue this hearing.

Mr. Salsberg has asked for an adjournment and we have given consideration to his request, but I can see no purpose in allowing the adjournment and unfortunately we must disallow his motion. This hearing is now concluded.

IN THE SUPREME COURT OF ONTARIO  
Divisional Court

BEFORE:

THE HONOURABLE MR.	)	
JUSTICE REID	)	
	)	THURSDAY, THE 31ST DAY
THE HONOURABLE MR.	)	
JUSTICE MONTGOMERY	)	OF MAY, A.D. 1990
	)	
THE HONOURABLE MR.	)	
JUSTICE CARRUTHERS	)	

IN THE MATTER OF the Real Estate and  
Business Brokers Act, R.S.O. 1980, c.431

AND IN THE MATTER OF the Ministry of  
Consumer and Commercial Relations Act,  
R.S.O. 1980, c. 274;

AND IN THE MATTER OF an appeal from the  
Decision and Order of the Commercial  
Registration Appeal Tribunal released  
January 28, 1988

B E T W E E N:

THE REGISTRAR OF REAL ESTATE AND  
BUSINESS BROKERS

Appellant

- and -

MAURICE L. COHEN

Respondent

**ENDORSEMENT OF THE DIVISIONAL COURT:**

This appeal is allowed. In our respectful opinion the findings of fact made by CRAT could not reasonably have led to their decision to grant registration, even on conditions, if the Tribunal had properly interpreted and applied s. 6(1)(a) and (b) of the Act. In our view, the evidence was overwhelmingly in favour of findings unfavourable to the applicant under both clause (a) and (b) of s.6. No other finding was reasonable, and registration should not have been granted. The Registrar is directed to revoke Mr. Cohen's registration. No costs are sought or granted.



## ORDER

THIS APPEAL, by the Registrar, Real Estate and Business Brokers Act, from the Decision and Order of the Commercial Registration Appeal Tribunal released January 28, 1988, was heard this day at 130 Queen Street West, Toronto, Ontario.

UPON READING the Decisions and Reasons of the Commercial Registration Appeal Tribunal, the material filed, and on hearing the submissions of counsel for the Appellant and Respondent.

1. IT IS ORDERED that the appeal be, and is hereby allowed.
2. AND IT IS ORDERED the Decision and Order of the Commercial Registration Appeal Tribunal released January 28, 1988, be, and is hereby set aside.
3. AND IT IS FURTHER ORDERED that the Registrar, Real Estate and Business Brokers Act, is directed to revoke the registration of the Respondent, Cohen, under the said Act.

*St. John*  
Registrar, Divisional Court

INSCRIT À/ENTERED AT  
TORONTO

IN FILM No.: 814  
DANS FILM No.:

ON/LE: JUN 29 1990

AS DOCUMENT No.: 1098  
EN TANT QUE DOCUMENT No.:

PER/PAR:

*JB*

SUPREME COURT OF ONTARIO  
(DIVISIONAL COURT)

BETWEEN:

NEW HOME WARRANTY PROGRAM vs. KOZIEROK

A217/90

BEFORE: HENRY/J, MONTGOMERY/J, CAMPBELL/J

DATE; JANUARY 11, 1991

**ENDORSEMENT**

The construction contract obligated the contractor to perform all the work and supply all the materials necessary to construct a completed home. The contractor therefore undertook the performance of all the work and supply of all the materials necessary to construct a complete home within the meaning of s.1.(a)

If it were otherwise, no one entering into a cost plus home construction contract could ever know until the house was fully built whether or not he came within the statutory protection of the warranty plan.

This is reinforced by s. 13 (2) which contemplates some exempt work and materials supplied by the owner.

The appeal is dismissed with costs to the respondent fixed at \$3,000.

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Henry, J.  
91 Jan 11

SUPREME COURT OF ONTARIO  
(DIVISIONAL COURT)

BETWEEN:

L.G. INVESTMENTS INC.  
(INN ON THE BAY)

Applicant (Appellant)

and

LIQUOR LICENCE BOARD OF ONTARIO  
Respondent

BEFORE: O'LEARY/J. - HARTT/J. - COO/J.

DATE: Sept. 7/90

DISPOSITION - THIS APPEAL -

The main submission of the Appellant is that in light of the evidence it put before the Board as to the care it took to see to it that it complied with the Liquor Licence Act and like Regulations. The Tribunal should have concluded that the Appellant was not guilty of any of the charges. In our view, there was evidence on which the Tribunal could have concluded that the efforts of the Appellant to avoid breaches of the Act or Regulations were not sufficient, since there was evidence that drunkenness occurred that ought to have been detected. If a proper system to detect it was in place, that a patron was served alcohol when such would not have happened if a proper system to prevent it was in place and followed by the employees and there was evidence that a bartender served alcohol after closing time - he knowing closing time had past accordingly we are asked to deal with a question of fact - whether the evidence ought to have been looked at in a different light by the Board - something that is beyond our jurisdiction. No question of law arises and the appeal is dismissed.

SUPREME COURT OF ONTARIODIVISIONAL COURTREID, STEELE and ARBOUR JJ.

RE: NORQUAY HOMES LIMITED and NORQUAY DEVELOPMENTS LTD. (Applicants/Appellants) v. REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT (Respondent/Respondent in Appeal)

COUNSEL: A.I.G. Michael for appellant.  
Brian M. Campbell for respondent Registrar.  
Linda C. McCaffrey, Q.C. for Attorney General for Ontario.

DATE: January 9, 1990.

ENDORSEMENT

The appeal is dismissed without costs.

The Tribunal directed that the appellant (a vendor under the Act) attach an addendum to all offers to purchase and file evidence with the Registrar of its compliance with s.12, Regulation 728 and, failing so to do, directed the Registrar to carry out his proposal to refuse to renew the registration of the appellant. The Tribunal considered that the basic issue was whether or not s.12 was ultra vires. Section 12 was applicable to all vendors under the Act. We agree that this is the underlying issue. The Tribunal concluded that it was intra vires. The Tribunal also concluded that the Registrar had no authority to require that a statutory

declaration be filed as proof of compliance. This latter decision was not appealed and we do not deal with it.

Section 12 requires the registrant (the appellant in this case) to furnish proof that the addendum forms part of every purchase agreement with respect to certain types of homes. The first four items relate to disclosure, planning status, reference numbers relating to the plan and the name and address of the builder. In our opinion, these are clearly items relating to communication between vendors and owners authorized under s.2(2), para. (d) of the Act and are a valid requirement.

Item 5 of the addendum provides for substantive terms of future (not existing) contracts of purchase and sale relating to the extension of the closing date set out in any contract to a maximum of 120 days with further optional provisions to another maximum of 120 days. Under s.13 of the Act, additional warranties may be prescribed by regulation. While the addendum probably could have been phrased as a warranty, it was not. We find that it is not a warranty.



The intent of the Act is to protect purchasers who acquire new homes from defects in construction and defaults by vendors. Section 2(2), para. (b) of the Act provides for a fund to assure compensation to owners who suffer damages. This compensation is payable not only for breach of warranty but also under s.14(1), para. (a) for the vendor's failure to perform the contract. There was evidence before the Tribunal that many owners had suffered damages by reason of the vendors not completing homes on time and breaching or failing to perform the contract.

Section 19 of Regulation 726 provides that the vendor warrants to pay such damages to the owner. In the event of failure so to do, the fund is liable. Therefore, any vendor is in a position to put the fund at risk. Section 7(1) sets out limitations on those who can be registered. These items relate to finances, past conduct and technical competence. Section 7(2) provides that a registrant is subject to terms and conditions to give effect to the purposes of the Act that are imposed by the regulations. The addendum is authorized by regulation and, in our opinion, gives effect to one of the

purposes of the Act. It protects the purchasers by ensuring that completion dates cannot be extended indefinitely by a registrant to the detriment of the purchaser. This encourages completion dates to be inserted in the original contract by responsible builders in the first place, and helps protect the integrity of the fund from claims for damages from failure of vendors to fulfil their contracts.

We find that the regulation in question is intra vires and that the Registrar and the Tribunal were correct in insisting upon compliance therewith. The respondents have not asked for costs.

*B. Reid*  
*J. W. Stuk*  
*W. W. W. W.*



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